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SUPREME COURT OF THE STATE OF WASHINGTON

PERRY MILLS,

Appellant,

v.

WESTERN WASHINGTON UNIVERSITY,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

For years, Professor Perry Mills hurled angry obscenities, discriminatory comments and threats at students and staff at Western Washington University ("Western"). As authorized by RCW 28B.10.648, the University held a hearing pursuant to Western's *Faculty Handbook*. Ultimately, Western's Board of Trustees ("University Board") rejected a request that Mills be dismissed, and ordered that he be suspended without pay for two academic quarters.

Western properly followed the procedures set forth in the *Faculty Handbook*, as directed by RCW 28B.10.648, and RCW 34.05.449(5). Mills was afforded more process than he was entitled under the state constitution. Contrary to Mills's assertions, the case law consistently states that there is no constitutionally protected right to verbally attack students and co-workers in a university workplace.

II. STATEMENT OF ISSUES

1. Mills verbally abused students, faculty, and staff over several years despite repeated warnings to cease his unprofessional behaviors. Did the University Board, in accordance with the *Faculty Handbook*, properly suspend Mills for two academic quarters without pay for serious and persistent neglect of faculty duties as set forth in the Code of Faculty Ethics?
2. The Faculty Handbook states a presumption that internal faculty disciplinary proceedings will be closed to the public. Did the University Board properly accept the *Faculty Handbook* as a provision of law authorizing closure under RCW 34.05.449(5); has

Mills shown that he was substantially prejudiced by closure of the hearing; and does article 1, section 10 of the Washington Constitution require that an agency's internal disciplinary proceedings be open to the public prior to the time when the administrative record is before the superior court and available for public inspection under the Public Records Act, Chapter 42.56?

3. The Code of Faculty Ethics, while stating the faculty's own presumption that faculty members will find the Code an adequate guide to their professional conduct, does not expressly state, in so many words, that faculty members cannot verbally abuse or intimidate colleagues and students based on personal characteristics such as gender, sexual orientation, or physically debilitating diseases. Are faculty standards of ethical conduct unconstitutionally vague or overbroad where it is clear what those standards proscribe in the vast majority of their intended applications and where such standards are readily susceptible to a narrowing construction by the courts?
4. Mills was warned in writing that the *Faculty Handbook* required his adherence to the Code of Faculty Ethics. He was denied a promotion based in substantial part on his use of foul and derogatory language directed at students and colleagues. He was repeatedly warned that his verbally abusive treatment of faculty, staff, and students would not be tolerated. Are faculty standards of ethical conduct unconstitutional as applied where such standards are coupled with actual notice of what specific behaviors will not be tolerated?
5. A panel of Mill's own faculty peers determined, on academic grounds, that Mills's mistreatment of Student CD was not germane to the subject matter of the course and was not motivated by legitimate pedagogical concerns. The University Board further concluded that Mills's mistreatment of Student CD was but one instance of an ongoing pattern of misconduct constituting serious and persistent neglect of faculty duties as set forth in the Code of Faculty Ethics. Does Mills have academic freedom to make hurtful and abusive statements to students that are not germane to the subject matter and that serve no legitimate pedagogical purpose?

III. STATEMENT OF THE CASE

Western is a public university located in Bellingham, Washington. Pursuant to RCW 28B.10.648, the University's Board and its faculty have long had in place a governance system that includes statements of institutional policy and procedure for academic employment, the Western *Faculty Handbook*. CP 1463-64, Final Order at 23-24, CL 1-2. The *Faculty Handbook* includes procedures for discipline and a Code of Faculty Ethics.¹

Mills is a tenured associate professor in the Theatre Arts Department in the College of Fine and Performing Arts at Western. CP 1442, Final Order at 2, FF 1.

In 1998, Mills applied for and was denied promotion to full professor. CP 1462, Final Order at 22, FF 69. In the report to the college dean from [then] Department Chair Thomas Ward, Ward recommended against Mills's promotion, describing Mills's berating, belittling and mistreatment of colleagues and students; Mills was put on notice that his behavior was unacceptable. CP 1460, 1462, Final Order at 20, 22, FF 64, 69.

¹ References herein to Western's *Faculty Handbook* are to Section I of the 2003-05 Edition, which applies to all faculty. For ease of reference, the major divisions of Section I are identified herein as "Articles" ("Art."), and subdivisions within Articles are identified as "Sections" ("§"). The Code of Faculty Ethics is cited as Appendix F ("App. F") to the *Faculty Handbook* (pp. 105-06).

In 2000, Mills received a written memorandum from [then] Department Chair Mark Kuntz, admonishing Mills for verbally abusing students and staff with profanities and threats, threatening to kill administrators and others he disapproved of, and carrying weapons on campus that were prohibited from campus under Western's rules. CP 1461, Final Order at 21, FF 65. Further, Kuntz informed Mills that the *Faculty Handbook* required adherence to the Code of Faculty Ethics, and warned Mills that his behavior must change. CP 1461, Final Order at 21, FF 65.

Mills blatantly disregarded the Department Chair's admonishment and warning. That same fall, Professor Deborah Currier came to Western as an untenured lecturer in the Theatre Arts Department. CP 1445, Final Order at 5, FF 13. On Currier's first day of work, Mills told her that she had better keep her legs closed because she could not be expected to teach students the same way she got her doctoral degree. CP 1445, Final Order at 5, FF 13. Over the next two years, Mills repeatedly attacked Currier in the workplace, calling her a "bimbo," a "slut," and on one occasion, a "cunt." CP 1445, Final Order at 5, FF 13. In addition to these direct verbal assaults, Currier learned that Mills also used sexually derogatory terms outside her presence, when referring to her while speaking to students. CP 1445, Final Order at 5, FF 13.

As a new faculty member, Currier did not feel she could step forward and complain. CP 1445, Final Order at 5, FF 14. However, after she secured a tenure-track position, Currier made it clear to Mills she would not tolerate his sexual innuendo; and he stopped further direct verbal abuse of her. CP 1445, Final Order at 5, FF 13. She reported her fear of Mills in a letter to Dean Carol Edwards (Dean of the College of Fine and Performing Arts) in October 2004. CP 1446, Final Order at 6, FF 14.

Kay Reddell, the Theatre Arts Department secretary, also experienced Mills's verbal attacks over a period of several years. CP 1447, Final Order at 7, FF 20. For example, Mills once said to Reddell, "You're just a stupid bitch. You're just white trailer trash." CP 1447, Final Order at 7, FF 20. Reddell did not feel it was appropriate for her to be demeaned and yelled at by Mills. CP 1447, Final Order at 7, FF 20.

In addition to personally experiencing his attacks, Reddell observed Mills's abuse of others. She witnessed Mills angrily calling faculty colleagues derogatory names at department meetings. CP 1451, Final Order at 11, FF 33. She also watched him lash out at students, including both the student office assistants Reddell supervised, and other students that came to the office seeking help in connection with Mills. CP 1457, Final Order at 17, FF 52. In Spring 2004, Reddell witnessed Mills's

anger towards a student assistant who had failed to return a film to the library; Mills was in the department office, screaming at the student. CP 1457, Final Order at 17, FF 52. Kuntz overheard Mills say, "You bitch, you screwed up. . . . I would understand if she were missing a leg . . . Is she retarded?" CP 1457, Final Order at 17, FF 52.

Mills's verbal abuse was extended to male co-workers as well. Gregory Pulver was hired as a classified staff member in 1997 in the Theatre Arts Department, obtaining a tenure-track faculty appointment in 1999. CP 1446, Final Order at 6, FF 16. In Fall 1997, Mills called Pulver "just a stupid faggot." CP 1446, Final Order at 6, FF 16. Pulver found this shocking from a professional colleague. CP 1446, Final Order at 6, FF 16. Pulver told Mills he would not tolerate his sexually offensive language, and Mills stopped insulting him to his face; however, Mills took to referring to Pulver as "Precious" in a lilting way that was suggestive of Pulver's sexual orientation. CP 1446, Final Order at 6, FF 16-17. Pulver heard from students about Mills's reference in class to Pulver as "Precious." CP 1446, Final Order at 6, FF 17. At a professional meeting in Alaska, a theatre professional with whom Pulver had no prior relationship, told Pulver, "Oh, I heard that your nickname was Precious," which caused Pulver incredible embarrassment. CP 1446, Final Order at 6, FF 17. Pulver felt intimidated, nervous and upset by Mills's treatment

of him; Pulver feared Mills's use of violent language, Mills saying he'd "like to kill them all, erase them from the world." CP 1447, Final Order at 7, FF 18. In the fall of 2004, Pulver wrote to Dean Edwards that he felt unsafe with Mills. CP 1447, Final Order at 7, FF 18.

Mills often used obscenities and derogatory language directed at or concerning students. CP 1456, Final Order at 16, FF 51. Currier heard Mills in conversation with students refer to various students as "shit for brains," "blondies," and one overweight student as "a 400-pound canary who warbles nothingness" and "makes him sick." CP 1456, Final Order at 16, FF 50. Students frequently complained to faculty members Pulver, Currier and Kuntz, and to Department secretary Reddell, that they were called derogatory names and the subject of profanity from Mills. CP 1456-57, Final Order at 16-17, FF 50-53. Students who complained in writing sought to have their complaints left in confidence due to fear of grade reprisal or being subjected to cursing obscenities from Mills; some expressed distaste for Mills calling students stupid, using obscenities towards them, criticizing Catholics and Christianity, and telling one student who defended Christianity that he should be castrated. CP 1458-59, Final Order at 18-19, FF 57-59.

In 2004, Mills's treatment of others resulted in numerous complaints forwarded to the college dean's office. One involved a verbal

exchange Mills had with a student who was returning to school in the Spring of 2004, after treatment for ovarian cancer. She was not fully recovered, had lost all of her hair, and was hesitant to make a presentation in Mills's class. CP 1452, Final Order at 12, FF 37. Mills testified that he told her that if she did not put up her work, "then you should have just died of cancer." CP 1452, Final Order at 12, FF 37. The student's eyes welled up with tears, and her classmates stared as she cast her work and put it up. CP 1452, Final Order at 12, FF 37. When the course was over, the student filed a written complaint. CP 1452, Final Order at 12, FF 36-38.

In the first week of Fall Quarter 2004, two other incidents resulted in students forwarding complaints about Mills. First, a student reported that Mills pulled out a knife larger than a Swiss Army knife at the conclusion of a class discussion and raised it into the air. CP 1454-55, Final Order at 14-15, FF 43-48. University regulations prohibit weapons on campus. WAC 516-52-020. The second complaint was lodged by a student who reported being verbally abused by Mills in a parking lot. She indicated in her complaint that she frequently observed Mills verbally abuse students in the classroom, that she felt it inappropriate, and that because she was enrolled in class with Mills, she felt unable to respond to

his verbal attack in the parking lot given his position of authority over her as her professor. CP 1453, Final Order at 13, FF 40-41.

On October 18, 2004, University Provost Andrew Bodman informed Mills that complaints had been lodged and he was to be suspended with pay pending investigation. Provost Bodman invited Mills to meet and conduct discussions at his earliest convenience. CP 1442, Final Order at 2, FF 2. A meeting was held on November 9, 2004; Mills was present and represented by counsel. CP 1442, Final Order at 2, FF 2.

Provost Bodman then asked the Executive Council of the Faculty Senate to appoint three faculty members to serve in accordance with Art. XVII § 1(2) of the *Faculty Handbook*. CP 1442-43, Final Order at 2-3, FF 3. The three faculty were tasked with conducting an inquiry and attempting to reach an informal resolution. Although a prolonged effort was made, it was unsuccessful. CP 1443, Final Order at 3, FF 3.

On June 6, 2005, Provost Bodman issued a formal Statement of Charges against Mills. CP 1443, Final Order at 3, FF 4. A five-day hearing was conducted by a five-member panel of faculty and a hearing officer. CP 1443, Final Order at 3, FF 5-6. Testimony was elicited from over a dozen witnesses, and many exhibits were admitted into evidence, including numerous student records which are protected from disclosure by the Family Educational Rights and Privacy Act of 1974 (“FERPA”),

20 U.S.C. § 1232g, which prohibits unauthorized disclosure of education records. Some of the student records contained confidential health information protected by Chapter 70.02 RCW. CP 1487, Final Order at 47, CL 68. Although Mills sought to have the hearing open to the public, the hearing was closed pursuant to rules in the *Faculty Handbook* which the University Board determined to be a “provision of law expressly authorizing closure” for purposes of RCW 34.05.449(5). CP 1486-87, Final Order at 46-47, CL 66-67. In regard to closing the hearing, the University Board expressed concern about the confidential student information disclosed in the hearings, including both educational and medical records. CP 1487, Final Order at 47, CL 68.

The Hearing Panel recommended Mills be suspended without pay from all faculty privileges and duties, including teaching, for two academic quarters, and recommended that Mills’s return to teaching be conditioned on signing a statement agreeing to comply with the Code of Faculty Ethics. CP 1443, Final Order at 3, FF 6. By notice dated November 10, 2005, Provost Bodman appealed to University President Karen Morse, requesting Mills be dismissed for cause; Mills cross-appealed, seeking reinstatement without any discipline. CP 1443-44, Final Order at 3-4, FF 7.

On January 17, 2006, President Morse issued her decision, affirming the sanctions recommended by the Hearing Panel, and adding additional training requirements. CP 1444, Final Order at 4, FF 8. Mills sought review from the University Board. On July 26, 2006, the University Board issued its Review Decision and Order on Remand, directing the Hearing Panel to reconsider whether Mills should be dismissed for cause, requesting the Hearing Panel to apply to the University Board's factual findings the definition of a "malicious" act as one that is substantially certain to cause harm and is done without just cause or excuse, or in reckless disregard of the law or of another's rights. CP 1444, Final Order at 4, FF 10.

The Hearing Panel reconvened, reconsidered the evidence and found itself unable "to articulate a discernible impact on any faculty member's or student's actual academic, scholarly, scientific or professional activities or achievements, whether of tenure, graduation, grades, scholarships or otherwise, that is *both* 'intentional and malicious,'" within the meaning of the *Faculty Handbook*. CP 1444, Final Order at 4, FF 11. The Hearing Panel therefore concluded that grounds did not exist to terminate Mills's employment under its reading of the *Faculty Handbook*. CP 1444-45, Final Order at 4-5, FF 11.

On October 27, 2006, the University Board issued its Review Decision and Final Order (hereinafter referred to as "Final Order"), a copy of which is attached hereto as Attachment A. The University Board concluded that its findings established that Mills seriously and persistently neglected his faculty duties with reference to the *Faculty Handbook*, Art. XV § F.B(1) "neglect of faculty duties" standard and Sections 1, 2 and 4 of the Code of Faculty Ethics. CP 1479, Final Order at 39, CL 46. The University Board based that conclusion on its findings that "faculty, staff, and students have been subjected over a period of years to the Petitioner's verbal abuse, sexual innuendo, harassment, intimidation, exploitation, and lack of self-discipline, restraint, and professional judgment." CP 1479, Final Order at 39, CL 46.

The University Board ordered that Mills be suspended without pay for two academic quarters. CP 1487, Final Order at 47, Order No. 1. The University Board also issued a protective order prohibiting confidential student information from disclosure, except as necessary for purposes directly related to the proceedings. CP 1489, Final Order at 49, Order No. 6. Reconsideration of the sanctions was sought by Provost Bodman and denied. CP 1494-95, Order on Pet. for Recon.

Mills filed an appeal in Whatcom County Superior Court on November 22, 2006. Mills did not seek a stay of decision nor did he seek

a trial setting. Western noted the case for trial in April 2007, and the case was set for hearing before the Honorable Steven Mura on September 6, 2007. At the request of the Superior Court, the argument was reset to October 29, 2007. Judge Mura issued his decision upholding the decision of the University Board on December 27, 2007. Mills filed a Notice of Appeal on January 22, 2008.

IV. ARGUMENT

A. Standard of Review

The burden of demonstrating the invalidity of agency action is on the party asserting invalidity. RCW 34.05.570(1)(a). The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced. RCW 34.05.570(1)(d).

In reviewing administrative actions, the reviewing court applies the APA review standards directly to the agency record. *Tapper v. State Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). On a record review, the superior court's findings of fact and conclusions of law are superfluous on appeal. *In re Griswold*, 102 Wn. App. 29, 34, 15 P.3d 153 (2000) (citation omitted). Where the petitioner, as here, fails to assign error to the findings of the agency, those findings are deemed verities on appeal. *Tapper*, 122 Wn.2d at 407 (citations omitted).

The appellate court applies the error of law standard to questions of law. RCW 34.05.570(3)(d). When the court is called upon to determine mixed questions of law and fact, the court determines the law independently, and then applies the facts as found by the agency. *Valentine v. Dep't of Licensing*, 77 Wn. App. 838, 844-45, 894 P.2d 1352 (1995), *review denied*, 127 Wn.2d 1020 (1995). Since the University Board's findings are unchallenged verities, the appellate court applies the law de novo directly to those unchallenged findings.

The court may only reverse an agency's decision if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

....

(i) The order is arbitrary or capricious.

RCW 34.05.570(3)(a)-(d), (i).

An agency's discipline or sanction is reviewed under the arbitrary and capricious standard. *Brown v. State, Dep't of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 17, 972 P.2d 101 (1999) (citations omitted). "Action taken after giving respondent ample opportunity to be heard, exercised honestly and upon due consideration, even though it may be believed an erroneous decision has been reached, is not arbitrary or capricious." *Id.* at 16-17 (citations omitted). The facts of this case are undisputed. Thus, the primary issue is whether Western correctly interpreted and applied the law.

B. Western Complied With All Applicable Contractual Procedures Governing The Discipline Of Tenured Faculty.

1. Western has broad legislative delegation to enact rules to employ, tenure, discipline, and dismiss faculty.

The authority of the Board of Trustees of Western is set out at RCW 28B.35.120. It states, in relevant part:

(2) Shall employ the president of the regional university, his assistants, members of the faculty, and other employees of the institution, who, except as otherwise provided by law, shall hold their positions, until discharged therefrom by the board for good and lawful reason.

....

(12) May promulgate such rules and regulations, and perform all other acts not forbidden by law, as the board of trustees may in its discretion deem necessary or appropriate to the administration of the regional university.

In addition, statutory authority is provided to establish a system for peer review proceedings in connection with tenure review, promotion, retention and discipline. RCW 28B.10.648 states, "Peer review proceedings shall be pursuant to rules and regulations promulgated by the respective institutions of higher education."

At Western, academic personnel rules and procedures are set out in the *Faculty Handbook*, including the procedures for faculty discipline. The *Faculty Handbook* is the product of a shared system of governance where the University Board relies on the advice of the University President and the faculty in forming internal policies and procedures. It has been in place for well over 20 years and has been amended from time to time. The *Faculty Handbook*, along with a faculty member's letter of appointment, constitute a faculty member's contract. Art. IV § B.1 states, in relevant part:

The terms and conditions of employment of a faculty member are contained in the faculty member's contract with the University, and shall include the provisions of this handbook. These terms and conditions, which shall have the approval of the department and the dean, will be described in a letter of offer from the Provost/Vice President for Academic Affairs. This letter and the provisions of this handbook will be the sole basis for determining the contract.

Faculty Handbook at 6.

It also states, in Art.III § C, Faculty Duties:

The *duties* of probationary and tenured faculty *include such activities as* classroom and laboratory instruction; preparation for teaching, research, scholarly and creative activities; scheduled office hours; student advisement; committee responsibilities; public service that uses faculty's professional expertise; and occasional special assignments. The duties of full-time, limited-term and part-time, limited-term faculty are defined in the letter of offer.

(Emphasis added.) *Faculty Handbook* at 3.

In Art. III § D, Scholarly and Professional Qualifications of Faculty Members, it states, in relevant part:

1. It is the policy of Western Washington University to appoint faculty members who provide evidence of achievement (or the promise of achievement) in teaching, in scholarly or creative endeavors, and in service to the University and community. Unless otherwise specified in the letter of appointment, retention shall be on the basis of continuing effectiveness in these areas. Assessment at all levels is to be carried out in accord with the unit evaluation plan.
 - a. *Faculty members have an obligation to adhere to and behave in keeping with the principles of faculty conduct contained in the Code of Faculty Ethics (found in Appendix F of the Handbook).*
 - b. Faculty have an obligation to pursue excellence in teaching.
 - c. Faculty have an obligation to engage in scholarly and/or creative activity of recognized quality.
 - d. Faculty have an obligation to serve their departments, colleges, university, and profession. In addition, the University values contributions to the wider scholarly and civic communities.

(Emphasis added.) *Faculty Handbook* at 3.

The *Faculty Handbook* includes specific provisions regarding faculty discipline. The preamble paragraph to Art. XV § F, Termination for Cause, provides that termination of an appointment with continuous tenure “may be effected by the institution only for adequate cause.” The *Faculty Handbook* lists five (5) reasons, one or more of which must exist to constitute adequate cause for dismissal, at Art. XV § F.B:

- 1) A serious and persistent neglect of faculty duties.
- 2) Unlawful discrimination or sexual harassment. (*See Appendix C of WWU FH.*)
- 3) Serious scientific or scholarly misconduct, consisting of, but not limited to, significant misrepresentation of credentials, falsification of data, plagiarism, abuse of confidentiality, violation of regulations applicable to research, or failure to meet minimum standards of professional competence.
- 4) Conviction of a felony.
- 5) Intentional and malicious interference with the scientific, scholarly, and academic activities of others.

Faculty Handbook at 28.

2. Western complied with the *Faculty Handbook's* procedures governing disciplinary charges.

The *Faculty Handbook* requires that certain steps be taken prior to filing a written statement of charges:

Procedures for Imposition of Severe Sanctions Including Dismissal for Cause

1. A formal hearing on charges relating to severe sanction or dismissal will be preceded by: (1) discussions between the faculty member and appropriate administrative officers looking toward a mutually acceptable settlement which, if agreed to, terminates the proceeding; (2) informal inquiry by a three-person panel chosen by the Executive Council of the Faculty Senate in consultation with the Chair of the Standing Committee on Grievance and Sanctions from among the members of the latter committee, which may effect an adjustment with the agreement of all parties. The three-person panel's inquiry is to be limited to discussions with the faculty member, Department Chair, Dean and Provost and is to be completed within 15 working days of formation of the Panel; (3) Failing such an agreement, within ten days a written statement of charges will be framed with reasonable particularity by the Provost and given to the faculty member and the President of the Faculty Senate.

Faculty Handbook at 29, Art. XVII § 1.

In his letter to Mills on October 18, 2004, Provost Bodman informed Mills that complaints had been lodged against him, invited Mills to meet and discuss the complaints "at his earliest convenience," and placed him on paid suspension. Faculty Senate President Jim Stewart received a copy of that letter. On November 9, 2004, Provost Bodman and Dean Edwards met and held discussions with Mills and legal counsel, in compliance with procedure (1) above.

Following that meeting, Provost Bodman requested that the Faculty Senate Executive Council appoint a three-member panel from the

Standing Committee on Grievance and Sanctions. That process occurred in Winter Quarter 2005 and constituted compliance with procedure (2) above. The panel attempted to “effect an adjustment,” but its efforts were unsuccessful.

In compliance with procedure (3), Provost Bodman next prepared a written statement of charges “framed with reasonable particularity,” and gave them to Mills and the Faculty Senate President on June 6, 2005. CP 1442-43, Final Order at 2-3, FF 1-4.

Mills asserts that, under the terms of the *Faculty Handbook*, he could not be suspended prior to the filing of a statement of charges. Mills Br. at 32-35. There is no provision in the *Faculty Handbook* which speaks to the authority of the Provost during investigation of complaints, prior to filing a statement of charges. Mills was, in effect, placed on administrative leave pending investigation of the complaints. The provisions in the *Faculty Handbook* relate to suspension *after* the formal filing of charges.

Provost Bodman’s decision to place Mills on paid leave pending the disciplinary hearing was not a violation of the *Faculty Handbook*. Under Title VII, “a suspension with pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action.” *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 803

(6th Cir. 2004), *aff'd*, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006). In *Donahue v. Cent. Wash. Univ.*, 140 Wn. App. 17, 163 P.3d 801 (2007), the University's decision to reassign a faculty member to other duties was not an adverse employment action for purposes of claiming retaliation for filing grievances. Donahue "did not lose tenure, he was not demoted, and he did not receive a reduction in pay." *Id.* at 26, ¶ 20. The instant case is indistinguishable from *White* and similar to *Donahue*. Mills's paid administrative leave pending the disciplinary hearing was not disciplinary.

Here, a complaint was forwarded to Provost Bodman that Mills had brandished a knife in the classroom. Another complaint levied serious charges of pervasive verbal abuse by Mills towards students, faculty and staff. Given the serious nature of the complaints received, Provost Bodman would have been remiss not to follow the recommendation of Dean Edwards and suspend Mills with pay pending investigation.²

Mills suffered no loss of pay or benefits during this period. The University Board correctly determined that Provost Bodman acted justifiably and within his authority in suspending Mills with pay at the

² Mills's reading would prevent Western's administration from ever taking summary or emergency action to protect the health, safety and welfare of students and employees on the University campus. Instead, a multitude of circumstances may arise where the Provost might prudently direct a faculty member to work at home and remain away from campus pending investigation of serious charges.

outset upon receipt of the complaints. CP 1485-86, Final Order at 45-46, CL 63.

Mills further asserts that Provost Bodman could not have suspended Mills without consulting with the Executive Council of the Faculty Senate first. Provost Bodman did inform the Executive Council by copy of the October 18, 2004, letter to its President, Jim Stewart. From that point forward, the Executive Council was on notice; Provost Bodman fulfilled his obligation of consultation at that stage.

The Executive Council likewise satisfied its obligations to appoint a three-person Faculty Panel in Winter Quarter 2005. Then, the Executive Council carried out its responsibility in the *Faculty Handbook*, Art. XVII § 2, and caused the formation of a five-person Faculty Hearing Panel for the hearing in Fall Quarter 2005.

In all respects, Western conducted the investigation, the disciplinary hearing process, appeal to the President, and review by the University Board in keeping with the *Faculty Handbook*.

C. The Administrative Hearing Was Properly Closed Under The *Faculty Handbook*.

The 2003-05 *Faculty Handbook* governed the relations among the University Board, administration, and faculty. *Faculty Handbook* at 1, Art.I § A. It provided that disciplinary matters would be heard by a five-

person committee. *Id.* at 29, Art. XVII § 2. The *Faculty Handbook* further provided that “[t]he hearing will be private, unless the Hearing Panel, in consultation with the Provost and only with the agreement of the faculty member, decides that the hearing should be public.” *Id.* at 30, Art. XVII § 2.d. This provision had the effect of law because institutions of higher education are not required to codify their policies and procedures relating to “employment relationships” in the Washington Administrative Code. RCW 34.05.010(16)(iv). The Hearing Panel, after hearing argument, denied Mills’s motion to open the hearing. The Hearing Panel and presiding officer did not provide additional rationale for closing the hearing other than to state that the decision was in accordance with Art. XVII § 2.d. CP1487, Final Order at 47, CL 67-68.

This decision to close the hearing comports with RCW 34.05.449(5), which permits the presiding officer to close the hearing in accordance with “a provision of law . . . or under a protective order . . . pursuant to applicable rules. . . .” RCW 34.05.449(5).³ The University Board regarded the *Faculty Handbook*’s hearing procedures as a “provision of law expressly authorizing closure” of the proceedings for

³ RCW 34.05.449(5) is modeled after § 4-211(6) of the Uniform Law Commissioners’ Model State Administrative Procedure Act (1981).

purposes of RCW 34.05.449(5). CP 1487, Final Order at 47, CL 67. *See* RCW 34.05.010(16)(iv).

The University Board subsequently issued a protective order to prohibit “the unauthorized disclosure of student education records,” noting that the “record herein is replete with protected education records, including numerous exhibits and extensive portions of the transcript of the proceedings. Some of these student records also contain confidential health information protected by chapter 70.02 RCW.” CP 1487, Final Order at 47, CL 68 (citing FERPA, 20 U.S.C. § 1232g).⁴

Mills asserts that the Hearing Panel’s decision to close the hearing violated RCW 34.05.449(5) and article 1, section 10 of the state constitution. Mills must show how he was prejudiced by the committee’s decision to close the hearing, even if the decision were a violation of RCW 34.05.449(5). He has failed to do so.

A court “shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced.” RCW 34.05.570(1)(d). The burden is on Mills to show how he has been prejudiced by the failure to open the hearing. RCW 34.05.570(1)(a), *Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 226, 173 P.3d 885 (2007)

⁴ *See* WAC 516-108-070 (procedure for issuing a protective order to close University hearings).

(burden is on the petitioner to show how the petitioner was prejudiced by the agency action). Mills makes no argument regarding how he was personally prejudiced by the disciplinary committee's decision to close the hearing.

Article 1, section 10 of the state constitution has never been applied to administrative hearings or employer disciplinary hearings. Article 1, section 10 provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Wash. Const. art. I, § 10. This provision "guarantees the public and the press a right of access to judicial proceedings and court documents in both civil and criminal cases '[O]perations of the courts and the judicial conduct of judges are matters of utmost public concern.'" *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004) (citing *Cohen v. Everett City Council*, 85 Wn.2d 385, 388, 535 P.2d 801 (1975) and quoting *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839, 98 S. Ct. 1535, 56 L. Ed 2d 1 (1978)). See also *Zylstra v. Piva*, 85 Wn.2d 743, 754, 539 P.2d 823 (1975) (Utter, J., concurring) (applying article 1, section 10, as a judicial requirement under the separation of powers doctrine).

Cohen is the only Washington case that applied the provisions of article 1, section 10 to an administrative record. The *Cohen* court held that article 1, section 10 only applied to the administrative transcript when

the superior court judge reached the merits of the controversy and not before. *Cohen*, 85 Wn.2d at 389.

In *Cohen*, the city council conducted a license revocation of a sauna parlor operation. The licensee appealed to superior court and obtained an order sealing the administrative record. As in this case, the license revocation proceeding was exempt from the Open Public Meetings Act (“OPMA”) under RCW 42.30.140.⁵ The issue before the *Cohen* court was to determine “whether the trial court’s action [in sealing the transcript] had reached a stage where justice was being ‘administered’ and therefore constitutionally required to be open.” *Cohen*, 85 Wn.2d at 388-89 (citing Wash. Const. art. I, § 10). After noting that the state constitution mandates an open public trial in a civil case, the *Cohen* court held that “[o]nce the court reached the merits of the controversy, the testimony – transcript – had to be part of the public record” and could not be sealed consistent with article 1, section 10 of the state constitution. *Cohen*, 85 Wn.2d at 389.

⁵ The OPMA does not apply to “(2) That portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group; or (3) Matters governed by chapter 34.05 RCW, the Administrative Procedure Act.” This proceeding was governed by the Administrative Procedure Act. *Refai v. Cent. Wash. Univ.*, 49 Wn. App. 1, 6, 742 P.2d 137 (1987), review denied, 110 Wn.2d 1006 (1988) (citations omitted).

As in *Cohen*, the transcript in *Mills* was subject to article 1, section 10 only when the superior court reached the merits of the controversy on appeal. The transcript, subject to redactions required under FERPA, 20 U.S.C. § 1232g, and RCW 70.02, was always available under the Public Records Act, RCW 42.56, and as an unsealed judicial record in superior court. The public has not been denied an opportunity to view the complete record leading up to *Mills*'s two-quarter suspension. See *Cohen*, 85 Wn.2d at 389; *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 129 Wn. App. 832, 120 P.3d 616 (2005), review granted in part, 158 Wn.2d 1024 (2007) (records relating to employee misconduct are not exempt under the Public Records Act, RCW 42.56).

It is noteworthy that 40 states have some type of constitutional open courts provision with varying terms. Suzanne L. Abram, *Problems of Contemporaneous Construction in State Constitutional Interpretation*, 38 Brandeis Law Journal, 613, 620 n.36 (2000). Out of these 40 states, *Mills* is only able to point to West Virginia and New York as having applied their open courts provisions to certain types of administrative hearings. *Mills Br.* at 18-19.

In *Daily Gazette Co., Inc. v. Comm. on Legal Ethics of W. Va. State Bar*, 174 W. Va. 359, 326 S.E.2d 705 (W. Va. 1984), the court found a compelling need for opening attorney disciplinary proceedings under the

State's open court's provision. *Daily Gazette*, 326 S.E.2d at 711 (citing West Virginia Const. art. III, § 17). The West Virginia court later extended its open courts provisions to medical disciplinary actions. *Daily Gazette, Co. Inc. v. W. Va. Bd. of Med.*, 177 W. Va. 316, 352 S.E.2d 66 (W. Va. 1986). In both of these cases, the Court only applied article III, § 17 of the West Virginia Constitution after there had been a finding of probable cause of misconduct. *Daily Gazette II*, 352 S.E.2d at 70 (citing *Daily Gazette I*, 326 S.E.2d 705).⁶ No such compelling need is required for public access to employee misconduct cases, particularly when the transcript is available through the Public Records Act or on judicial review.

In *Herald Co., Inc. v. Weisenberg*, 455 N.Y.S.2d 413, 89 A.D.2d 224 (1982), *aff'd*, 59 N.Y.2d 378, 452 N.E.2d 1190 (1983), the court held that unemployment benefit cases must be open to the public under New York's Judiciary law.⁷ Curiously, the New York courts did not extend this

⁶ Article III, section 17 of the West Virginia Constitution provides: "The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay." The text is significantly different than article 1, section 10 of the Washington Constitution.

⁷ "The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, criminal sexual act, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court." New York Judiciary Law, § 4.

provision to attorney disciplinary actions, *Matter of Capoccia*, 59 N.Y.2d 549, 466 N.Y.S.2d 268, 453 N.E.2d 497 (1983); disciplinary proceedings involving a license to practice dentistry, *Johnson Newspaper Corp. v. Melino*, 547 N.Y.S.2d 915, 917 (N.Y. App. Div. 1989); or disciplinary proceedings involving a license to practice medicine, holding that these proceedings were confidential, *Dr. J.P. v. Chassin*, 594 N.Y.S.2d 930 (N.Y. App. Div. 1993).

Mills claims he was denied due process when the disciplinary committee closed the hearing.⁸ As a tenured professor, Mills had a protected property right. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576-78, 92 S. Ct. 2701, 2708-10, 33 L. Ed. 2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 599-602, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). But Mills was provided with fundamental due process: “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976) (internal quotes and citation omitted).

⁸ Mills misplaces reliance on *Morgan v. U.S.*, 304 U.S. 1, 58 S. Ct. 999, 82 L. Ed. 1129 (1938) for the proposition that all administrative hearings must be open to the public in order to satisfy the due process clause. The Court, instead, held that the ex parte access of the government prosecutors to the adjudicating Secretary was a “vital defect” contrary to the constitutional guarantee of the due process clause in a rate setting case.

The proceeding here was not a criminal proceeding or even a quasi-criminal proceeding that would have warranted heightened due process protection. *Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n.*, 144 Wn.2d 516, 527, 29 P.3d 689 (2001). See *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005) (“disciplinary hearings against students and faculty are not criminal trials, and therefore need not take on many of those formalities – the additional procedures required will vary based on the circumstances and the three prongs of *Mathews*.”). In student expulsion cases, for instance, “courts have been unanimous . . . in concluding that hearings need not be open to the public . . .” *Id.*

In *Gunasekera v. Irwin*, 517 F. Supp.2d 999 (S.D. Ohio 2007), a university professor was suspended for three years for allowing rampant plagiarism in his department. The professor demanded a name-clearing hearing open to the public. The court, citing *Flaim*, determined that due process did not require that the name-clearing hearing be conducted in public. *Gunasekera*, 517 F. Supp.2d at 1014.

Western provided Mills with much more process than was due. He was provided with notice of the charges, the right to counsel, the right to call and cross-examine witnesses under oath, and the right to seek review to the University Board. These protections guaranteed him a fair and

impartial disciplinary hearing that comported with fundamental due process. Western properly closed Mills's hearing under the *Faculty Handbook*; Mills has shown no prejudice from this closure, and the closure did not violate article 1, section 10 or the due process clauses of the state or federal constitutions.

D. The Code Of Faculty Ethics Is Not Facially Vague.

Associate Professor Mills asserts that the Code of Faculty Ethics is unconstitutionally vague and overbroad in violation of his First and Fourteenth Amendment rights. Generally, a standard of professional conduct is vague or overbroad only if it fails to provide reasonable notice of what conduct is prohibited or if it chills the exercise of protected speech. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (vagueness), 114-15 (overbreadth), 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

However, while teachers have a right to know what conduct is prohibited, due process does not require an academic institution to expressly prohibit every imaginable inappropriate action by its faculty. *Arnett v. Kennedy*, 416 U.S. 134, 161-62, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974); *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993). Nor is perfect clarity required even when a policy regulates protected speech. *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001).

“Condemned to the use of words, we can never expect mathematical certainty from our language.” *Grayned*, 408 U.S. at 110.

A regulation is unconstitutionally vague in the First Amendment context only if its chilling effect on protected expression is both “real and substantial,” and the regulation is not “readily susceptible” to a narrowing construction by the courts. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 60, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976). Uncertainty at the regulation’s margins will not warrant facial invalidation if it is clear what the regulation proscribes in the vast majority of its intended applications. *Hill v. Colorado*, 530 U.S. 703, 733, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000). The Constitution, moreover, tolerates more vagueness in an educational context where the challenged regulation reasonably relates to legitimate pedagogical concerns. *Cal. Teachers Ass’n*, 271 F.3d at 1154.

Western’s *Faculty Handbook*, Art. III § D.1.a, imposes on all faculty members “an obligation to adhere to and behave in keeping with the principles of faculty conduct contained in the Code of Faculty Ethics.” The Code of Faculty Ethics, in pertinent part, requires faculty members to “*exercise self-discipline and judgment in using, extending and transmitting knowledge.*” App. F § 1. Faculty must “*respect students as individuals;*” they must “*avoid and condemn sexual harassment, intimidation, and the exploitation of students.*” App. F § 2. Faculty

members are expected to show “*respect for the opinions of others*” and to “*strive to be fair in their professional judgment of colleagues.*” App. F § 4.

The Preface to the Code of Faculty Ethics recites the Code’s adoption by the faculty as “a guide for present and future members of the University faculty.” Section 9 of the Code states the faculty’s own presumption that faculty members will find the Code “an adequate guide for the choices they must make in the fulfillment of their academic functions.” Certainly it should not be presumed that the faculty members who voted to approve the Code did not know what the Code proscribes in the vast majority of its intended applications. The University Board correctly concluded that ethical standards requiring faculty members to respect the dignity and opinions of colleagues and to respect students as individuals, while broadly phrased and lacking in mathematical precision, are sufficiently clear to put Mills on notice that faculty members should not verbally abuse or intimidate colleagues and students based on personal characteristics such as gender, sexual orientation, or physically debilitating diseases. CP 1477, Final Order at 37, CL 40.

If there is any uncertainty at the margins of what the Code proscribes, such uncertainty is “readily susceptible” to a narrowing construction by the courts. *Virginia v. Am. Booksellers Ass’n, Inc.*, 484

U.S. 383, 397, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988); *Cal. Teachers Ass'n*, 271 F.3d at 1147. A faculty handbook provision stating that disciplinary procedures shall not be used to restrain faculty in their exercise of academic freedom will itself provide the narrowing construction that is required. *Adamian v. Jacobsen*, 523 F.2d 929, 934-35 (9th Cir. 1975). Western's *Faculty Handbook*, Art. XVI, expressly provides that "[s]anctions will not be used to restrain faculty members in their exercise of academic freedom or other rights guaranteed by the United States Constitution and the Constitution of the State of Washington." The Washington Court of Appeals has interpreted nearly identical language in a faculty handbook as a sufficient limitation on conduct standards that were challenged as vague and overbroad. *Stastny v. Bd. of Trs. of Cent. Wash. Univ.*, 32 Wn. App. 239, 255, 647 P.2d 496 (1982), *review denied*, 98 Wn.2d 1001 (1982), *cert. denied*, 460 U.S. 1071 (1983).

The Ninth Circuit in *Adamian*, 523 F.2d at 934-35, upheld the constitutionality of a conduct standard that required professors to "exercise appropriate restraint and show respect for the opinions of others." The language approved in *Adamian* is virtually identical to Western's own Code of Faculty Ethics requiring the "exercise [of] self-restraint and judgment" and "respect for the opinions of others."

Western's standards of faculty conduct, like those examined in *Adamian*, closely track the *1940 Statement of Principles on Academic Freedom and Tenure* and the *Statement on Professional Ethics* of the American Association of University Professors (AAUP). These and other AAUP policy statements are collected in a publication known informally as *The Redbook*. See *AAUP Policy Documents and Reports*, at 3-4, 171-72 (10th ed. 2006).⁹ As *Adamian* illustrates, the courts will look to the AAUP's policy interpretations in evaluating the constitutionality of an institution's own standards of ethical conduct. The Washington Supreme Court has likewise recognized the AAUP's *1940 Statement of Principles* as "the most authoritative source regarding the meaning and purpose of [faculty] tenure." *Barnes v. Wash. State Cmty. Coll. Dist. No. 20*, 85 Wn.2d 90, 93-94, 529 P.2d 1102 (1975).

Section 9 of Western's Code of Faculty Ethics expressly requires that the Code be interpreted and applied in accordance with the AAUP's *1940 Statement of Principles on Academic Freedom and Tenure*. The *Faculty Handbook*, Art. III § B, further provides that all faculty members are guaranteed academic freedom as set forth in the *1940 Statement of Principles*. The language of Western's Code of Faculty Ethics derives

⁹ The AAUP's *1940 Statement of Principles* and its *Statement on Professional Ethics* are attached as Attachments B and C, respectively, for the convenience of the Court.

almost verbatim from the AAUP's *Statement on Professional Ethics*. Thus, according to the AAUP's own policies, faculty members must "exercise critical self-discipline and judgment in using, extending, and transmitting knowledge." They must "demonstrate respect for students as individuals" and must "avoid any exploitation, harassment, or discriminatory treatment of students." They must "show due respect for the opinions of others" and must "strive to be objective in their professional judgment of colleagues."

Judicial notice may be taken, as it was in *Adamian*, that the AAUP exists as an organization for the purpose of vigorously defending academic freedom and the civil rights of individual faculty members. If the language of Western's faculty code is clear enough for the AAUP, it should be clear enough for Mills. This Court should conclude, as did the court in *Adamian*, that exercising appropriate restraint and respecting the opinions of others does not countenance, in the AAUP's own words, "serious intemperateness of expression." *Adamian*, 523 F.2d at 934-95 (citing the AAUP *Redbook*).

E. The Code Of Faculty Ethics Was Not Unconstitutionally Applied To Associate Professor Mills.

A conduct standard, even if facially vague, is not unconstitutionally vague as applied if it is coupled with sufficient notice of

what conduct is proscribed. *Stastny*, 32 Wn. App. at 253-54. A faculty member has sufficient notice of what conduct is proscribed if, based on existing policies, discussions, and other communications, it is reasonable for the institution to expect the faculty member to know that his conduct was prohibited. *Ward*, 996 F.2d at 454. A teacher thus has fair notice when he has been repeatedly warned that his behaviors will not be tolerated. *Sinnott v. Skagit Valley Coll.*, 49 Wn. App. 878, 886-87, 746 P.2d 1213 (1987), *review denied*, 110 Wn.2d 1010 (1988); *Stastny*, 32 Wn. App. at 254.

Associate Professor Mills was repeatedly warned that his behaviors would not be tolerated. He was denied a promotion to Full Professor in 1998-99 based in substantial part on demonstrated weaknesses in teaching and service. Weaknesses included using foul language with and toward students and colleagues, employing a combative teaching style, discussing other faculty members with students in a derogatory and demeaning manner, and berating students and colleagues in the guise of humor. CP 1460-61, Final Order at 20-21, FF 64.

In October 2000, Department Chair Kuntz admonished Mills in writing about his making of off-color remarks about colleagues, women, gay students, and ethnic minorities. The letter directed Mills's attention to Section 2 of the Code of Faculty Ethics, where it is stated that "faculty

avoid and condemn sexual harassment, intimidation, and the exploitation of students.” The letter informed Mills that the *Faculty Handbook* required adherence to the Code of Faculty Ethics, and concluded by warning Mills, “Your behavior must change.” CP 1461, Final Order at 21, FF 65.

The following year, Kuntz addressed yet another letter to Mills lamenting his continued lack of cooperation in remedying his behavioral deficiencies. While expressly acknowledging Mills’s free speech rights, Kuntz admonished him, stating:

Your behavior scares people. You know it. Your repeated need to express your desire to “kill” people is not appropriate, and will stop . . . Your lack of sensitivity or care about the needs of students, staff, and colleagues must stop.

Kuntz concluded by requesting a meeting to work out a strategy for ensuring that Mills would come to work unarmed, make a concerted effort to be collegial, and generate a communication approach that allowed for his free speech rights while taking into account the individual rights of others. CP 1461-62, Final Order at 21-22, FF 66.

Based on these unchallenged factual findings, now verities on appeal, the University Board correctly concluded that the repeated written warnings, together with other discussions and communications, more than sufficed to put Mills on notice that his behaviors were unacceptable.

CP 1478, Final Order at 38, CL 42. In so concluding, the University Board correctly rejected Mills's misplaced reliance on *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 520 U.S. 1140 (1997). Professor Cohen was disciplined without ever being told that a new sexual harassment policy prohibited behaviors that the College had tolerated for years. Mills has no such excuse.

Particularly instructive, and in marked contrast to *Cohen v. San Bernardino Valley Coll.*, is *Sinnott*, 49 Wn. App. at 886-87, holding that conduct standards were not unconstitutionally vague as applied where a tenured instructor was terminated after repeated warnings that the standards prohibited his profanity and derogatory statements about other faculty members. So also, in *Simmons v. Vancouver Sch. Dist.*, 41 Wn. App. 365, 372, 704 P.2d 648 (1985), *review denied*, 104 Wn.2d 1018 (1985), the court rejected a vagueness challenge where written warnings and disciplinary conferences had made it clear to the teacher what conduct was proscribed. The same result obtained in *Stastny*, 32 Wn. App. at 253-54, and for similar reasons.

Stastny, *Simmons*, and *Sinnott* all involved dismissals of teachers who had failed to remedy their performance deficiencies despite repeated warnings and progressive discipline. In each case, the Washington Supreme Court denied review. Much less should review be accepted in a

case such as this where the challenged disciplinary sanction, imposed after repeated warnings, is itself part of a progressive disciplinary process intended to remedy, short of dismissal, Associate Professor Mills's "serious intemperateness of expression."

F. The University Board Did Not Discipline Mills Based Solely On His Offensive Statement To Student "CD."

Associate Professor Mills focuses his entire academic freedom claim on isolated conclusions of law in the University Board's Final Order relating to a single student identified in the record as "CD." CD is the emotionally fragile young student recovering from ovarian cancer. Mills challenges none of the University Board's factual findings relating to CD. He simply asserts a First Amendment "privilege" to bully her into submission by exploiting her insecurities, deliberately targeting her physical infirmities. He is unrepentant on this point. In fact, he suggested at his disciplinary review hearing that he might do again what he did to CD, even though he acknowledged that his behavior toward her was "brutal." CP 1462, Final Order at 22, FF 70.

The University Board's Final Order, in any event, was not based on Mills's mistreatment of CD alone. The University Board's findings relating to CD were cited only as "a particularly egregious *instance* of...Mills's *characteristic* inability to exercise appropriate self-

discipline and restraint in dealing with students' personal and academic challenges." (Emphasis added.) CP 1473-74, Final Order at 33-34, CL 30.

Mills was disciplined for "serious and persistent neglect of faculty duties," one of the grounds constituting "adequate cause" under the *Faculty Handbook*, Art. XV § F.B.1. CP 1479, Final Order at 39, CL 46. The University Board correctly recognized that the "neglect of faculty duties" standard prohibits misconduct that is both serious and persistent. CP 1469, Final Order at 29, CL 20. The University Board concluded that its factual findings, "considered as a whole," established serious and persistent neglect of faculty duties with reference to §§ 1, 2, and 4 of the Code of Faculty Ethics. CP 1479, Final Order at 39, CL 46. The University Board based this conclusion on numerous factual findings that Mills had subjected faculty, staff, and students to verbal abuse, sexual innuendo, harassment, intimidation, and exploitation over a period of years. CP 1479, Final Order at 39, CL 46. Mills challenges none of these factual findings, all of which are thus verities on appeal.

Mills does not, and could not, assert a First Amendment privilege to call a female colleague a "slut" and a "cunt," a male colleague a "faggot," an administrative secretary a "stupid bitch" and "white trailer trash," and a student assistant a "bitch" and "retarded." He cannot

seriously maintain that a college instructor is privileged to tell his students to “buy your moms skimpy dresses and a motorcycle and then send them to me, but first they have to be naked.” CP 1459, Final Order at 19, FF 59. He is wrong if he believes that the First Amendment allows him to use class time to rail against Christianity, Catholics in particular, or to tell a student who questions these attitudes that he should be “castrated.” CP 1458-59, Final Order at 18-19, FF 57. *See, e.g., Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491-92 (3rd Cir. 1998) (prohibiting professor from discussing his religious views in class). Yet, these are only some of the many uncontested findings on which the University Board based its conclusion that Mills’s mistreatment of others was both “serious” and “persistent.” CP 1480-81, Final Order at 40-41, CL 50-51. Mills’s treatment of CD is cited as but one example of multiple statements concerning or directed at students that were either “racially charged” or that exhibited a “callous insensitivity to mental and physical disabilities.” CP 1480-81, Final Order at 40-41, CL 50.

The University Board correctly concluded, based on all these findings, that “effective remedial action” was required to protect Western and its faculty, staff, and students from Mills’s “unrestrained indifference” to the civil rights of women, gays, racial minorities, and persons with disabilities. CP 1480-81, Final Order at 40-41, CL 50. The University

Board's concern was not about "political correctness," but about its fiduciary and legal duty to protect faculty, staff, and students from a continuing pattern or practice of discriminatory treatment as required by Titles VI and VII of the Civil Rights Act of 1964, RCW 49.60, and other civil rights laws. With or without the University Board's findings relating to CD, effective remedial action was required.

Thus, even if Mills could show that his mistreatment of CD was somehow privileged, which he cannot, the University Board has easily met its burden of showing that Mills would and should have been disciplined anyway. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); *Binkley v. City of Tacoma*, 114 Wn.2d 373, 382, 787 P.2d 1366 (1990).

G. Academic Freedom Does Not Protect Classroom Speech That Is Not Germane To The Subject Matter.

Mills's statement to CD was not privileged. CD, a Theatre Arts student, had just returned to school following surgical and chemotherapy treatments for ovarian cancer. She enrolled in Mills's dramatic writing class, a requirement for her major. She was not fully recovered, was still bald from chemotherapy, and, in her words, "faced her insecurities every day." At first she volunteered, but then expressed reticence about presenting a playwriting piece for the class. Mills stated in response, in

front of the entire class, that if she would not put up her work, then she might just as well have died from cancer. Her eyes welled up with tears and her classmates stared as she proceeded to put up her work. CP 1452, Final Order at 12, FF 37.

Mills acknowledged that his words were hard. He knew that he had hurt her; he stated as much. He nonetheless justified his conduct, months after the fact, by claiming that he was only trying to motivate CD to put up her work, to teach her that artists cannot live as artists if they do not produce their art. CP 1452, Final Order at 12, FF 38. Even assuming that Mills on some level was trying to motivate CD to produce her work, his approach, as CD rightly complained, was “entirely inappropriate.” A panel of Mills’s faculty peers agreed with CD. Mills’s own faculty colleagues found that his approach was merely abusive and served no legitimate pedagogical purpose. The courts do not sit as “ersatz deans or educators” in reviewing the professional judgment of faculty and educational administrators as to what does nor does not serve a legitimate pedagogical purpose. *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992).

While academic freedom is a “special concern” of the First Amendment, *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), the courts

traditionally refrain from interfering with an educational institution's genuinely academic decisions or with its exercise of subjective professional judgments. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985). Nor will the courts disturb the lawful exercise of the institution's own essential academic freedoms to determine for itself on academic grounds what may be taught, how it will be taught, and who will teach it. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978) (citing *Sweezy v. State of N.H.*, 354 U.S. 234, 263, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957) (Frankfurter J., concurring)).

Academic freedom thus thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 237, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000) (Souter, J., concurring) (citing *Ewing*, 474 U.S. at 226 n.12). While teachers and students do not shed their constitutional rights at the schoolhouse gate, public schools can restrict their speech as necessary to prevent substantial interference with schoolwork, discipline, or the rights of others. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506-08, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). Since the classroom is not a public forum, the institution may

impose reasonable restrictions on classroom speech that relate to “legitimate pedagogical concerns.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270, 273, 108 S. Ct. 562, 98 L. Ed.2d 592 (1988).

Tinker and *Hazelwood* both involved speech in public high schools. *Hazelwood* reserved deciding whether the same degree of deference would be appropriate at the college and university level. *Hazelwood*, 484 U.S. at 273, n.7. The Ninth Circuit has expressly applied *Hazelwood* to curricular speech at the college level, indicating that the academic freedom of the institution to control its curricular policy arguably broadens as academic rigor increases and the student’s learning becomes more advanced. *Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003). *Accord, Vega v. Miller*, 273 F.3d 460, 466-68 (2nd Cir. 2001), *cert. denied*, 535 U.S. 1097 (2002); *Vanderhurst v. Colo. Mountain Coll. Dist.*, 208 F.3d 908, 914-15 (10th Cir. 2000).

Academic freedom at the college level generally protects classroom speech that is “germane” to the subject matter, even though such speech may be offensive to some. *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001), *cert. denied*, 535 U.S. 970 (2002). Classroom speech is not germane if it bears no reasonable relationship to the course content and is contrary to a policy regulating speech that the institution has determined to be disruptive to the educational process.

Bonnell v. Lorenzo, 241 F.3d 800, 820 (6th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001) (sexually harassing language served no legitimate pedagogical purpose); *Martin v. Parrish*, 805 F.2d 583, 585-86 (5th Cir. 1986) (academic freedom did not protect gratuitous classroom profanity).

Mills's reliance on *Hardy* is entirely misplaced. *Hardy* involved a course in language and social constructivism in which racial and sexual epithets (words like "faggot," "nigger," and "bitch") were discussed in an academic context and for a legitimate pedagogical purpose. Far more instructive than *Hardy* are the "classroom motivational" cases in which the instructors unsuccessfully argued that their boorish behaviors were justified as efforts to motivate their students to excel. Thus, in *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1191 (6th Cir. 1995), the court rejected the claim of an athletics coach that academic freedom permitted his use of racial epithets to motivate his players. The court upheld the institution's determination that the use of such epithets served no legitimate educational purpose. The same result occurred in *Martin*, 805 F.2d at 585-86, where sexually offensive language was found not to be "germane," even though such speech was ostensibly used for the purpose of motivating students to perform.

As the Superior Court stated in its Oral Decision, Associate Professor Mills could easily have "motivated" CD to put up her work

simply by telling her to do it. CP 19, Oral Decision at 8. If Mills had really wanted to make a point about artists needing to produce their work, he could have done so without targeting CD's struggle with cancer. The hurtful words that Mills directed at CD had nothing to do with the class, were not germane to the subject of playwriting, and served no legitimate pedagogical purpose. In the words of the Superior Court, they were only grotesque and cruel. CP 22, Oral Decision at 11.

H. Attorney Fees Should Not Be Awarded In This Matter.

The statutory basis for attorney fees relied upon by Mills, RCW 4.84.350(1), provides that a qualified party prevailing in a judicial review of an agency action shall be awarded attorney fees "unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." Respondent Western was justified in seeking to uphold its institutional standards of ethics, protect its students and faculty, and discipline Mills pursuant to the *Faculty Handbook* for his many years of abusive conduct.

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V. CONCLUSION

For the reasons stated above, Western Washington University respectfully requests that the Court affirm the University Board's decision.

RESPECTFULLY SUBMITTED this 30 day of May, 2008.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Wendy Bohlke", written over the printed name.

WENDY K. BOHLKE, WSBA #8085
Assistant Attorney General, Senior Counsel
Attorney for Respondent Western
Washington University

ATTACHMENT A

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7 **BOARD OF TRUSTEES**
8 **WESTERN WASHINGTON UNIVERSITY**

9 In the Matter of:

10 Professor PERRY MILLS,

11 Petitioner.

REVIEW DECISION
AND FINAL ORDER

12
13 THIS MATTER came before the Board of Trustees of Western Washington University
14 ("Board") on a petition by Professor Perry Mills ("Petitioner") for review of the Findings and
15 Judgment of the Hearing Panel ("Panel Decision"), and of the President Review of the
16 Findings and Judgment of the Hearing Panel ("President's Decision"). The President's
17 Decision affirmed the Panel's recommendation of a two-quarter suspension without pay for
18 violations of the Code of Faculty Ethics. Generally, those violations consisted of serious
19 verbal abuse and intimidation of students, faculty, and staff over a period of years.

20 We have reviewed the record herein, consisting of the exhibits and verbatim transcript
21 of the proceedings, and have considered the written and oral submissions of counsel. Having
22 also remanded this matter to the Hearing Panel for further proceedings, and having now
23 reviewed the Panel's Decision on Remand, the Board of Trustees hereby affirms the Panel's
24 reconsidered decision and adopts the Panel's recommendation of a two-quarter suspension
25 without pay.
26

1 While the Board has elected in this instance to defer to the Panel's recommended
2 sanction, we have done so reluctantly and primarily out of respect for the reconsidered
3 judgment of the Petitioner's faculty peers that the Petitioner is at least capable of reforming
4 his abusive behaviors. That said, we as trustees share with the faculty the guardianship of the
5 fundamental ethical standards and values that must guide the conduct of all members of our
6 academic community. The Petitioner is on notice that the University and this Board of
7 Trustees cannot and will not tolerate the abusive and unprofessional conduct exhibited on this
8 record.

9 10 I. FINDINGS OF FACT

11 A. Procedural Facts

12 1. Petitioner Perry Mills is a tenured faculty member with the rank of Associate
13 Professor. RP III 99, 102.¹ He has worked and taught in the University's Theatre Arts
14 Department for more than twenty years, receiving tenure in 1994. RP III 100, 114.

15 2. By notice dated October 18, 2004, Provost Andrew Bodman suspended the
16 Petitioner with pay pending an investigation of complaints received from faculty and students.
17 RP II 61-62; EX 2. The notice afforded Petitioner a post-suspension opportunity to meet "[a]t
18 [his] earliest convenience" with the Provost and other University officials to review and
19 discuss the complaints. The record indicates that such a meeting occurred on November 9,
20 2004, and that the Petitioner was represented by counsel. RP II 64. Petitioner's suspension
21 with pay has continued without interruption since October 18, 2004.

22 3. Following the notice of suspension, and in accordance with Art. XVII § 1(2) of
23 the Faculty Handbook,² Provost Bodman requested the Executive Council of the Faculty

24 ¹ Citations to the hearing record are to the verbatim Record of Proceedings (e.g., RP III 99, referring to
25 page 99 of Volume III) and to the Exhibits (e.g., EX 3.2, referring to the second page of Exhibit 3).

26 ² All references herein to the Western Washington University Faculty Handbook are to Section I of the
2003-05 Edition. For ease of reference, the major divisions of Section I are identified herein as "Articles," and
subdivisions within Articles are identified as "Sections."

1 Senate to appoint three members of the faculty's Standing Committee on Grievances and
2 Sanctions to conduct an inquiry and attempt to "effect an adjustment." RP II 65; EX 2. The
3 efforts of the parties to reach an informal resolution continued over a prolonged period, but
4 ultimately proved unsuccessful. RP II 65-66.

5 4. On June 6, 2005, following the failure of negotiations, Provost Bodman issued
6 a formal Statement of Charges against the Petitioner. RP II 66. Before hearing any evidence,
7 the Hearing Panel granted the Petitioner's motion to exclude the Statement of Charges from
8 the hearing record. RP II 15-23. Instead, the issues were reframed in a Summary of
9 Statement of Charges, a document that was ultimately marked and admitted as Exhibit 17 by
10 stipulation of the parties. RP III 22.

11 5. The Hearing Panel consisted of five faculty members selected from the Faculty
12 Senate's Standing Committee on Grievances and Sanctions: Jeffrey Grimm, James Inverarity,
13 Laura Laffrado, John Purdy, and David Rystrom. A Hearing Officer, the Honorable Robert
14 H. Alsdorf, was appointed to serve as a non-voting presiding officer. The Hearing Panel
15 received evidence and heard oral arguments in this matter on October 5, 12, 13, 14, and 19,
16 2005. The University, through Provost Bodman, Dean Carol Edwards, and former
17 Department Chair Mark Kuntz, was represented by Wendy Bohlke of the Attorney General's
18 Office. The Petitioner was represented by attorney James Lobsenz.

19 6. The Hearing Panel issued its decision on October 31, 2005. See Findings and
20 Judgment of Hearing Panel. The Panel Decision recommended that the Petitioner be
21 suspended without pay, but with continued medical benefits, for two academic quarters during
22 the regular academic year. The Panel also recommended that the Petitioner be permitted to
23 resume his faculty privileges and duties only upon signing a statement agreeing to comply
24 with the Code of Faculty Ethics.

25 7. By notice dated November 10, 2005, the Provost filed an appeal to University
26 President Karen Morse requesting that the Petitioner be dismissed for cause. By notice dated

1 November 14, 2005, the Petitioner filed a cross-appeal requesting that he be immediately
2 reinstated without any disciplinary action being imposed.

3 8. The President issued her decision on January 17, 2006. See President Review
4 of the Findings and Judgment of the Hearing Panel. The President affirmed the sanctions
5 recommended by the Hearing Panel. In addition to those sanctions, the President directed
6 Dean Carol Edwards to require certain "affirmative steps," including sexual harassment
7 training, to ensure that the Petitioner complies with his obligations as a faculty member.

8 9. By notice dated January 26, 2006, the Petitioner filed this petition for review
9 by the Board of Trustees. The Board issued a Notice of Hearing dated February 7, 2006,
10 setting a hearing in this matter for April 14, 2006. At the request of Petitioner's counsel, the
11 hearing was continued to June 8, 2006, at 3:00 p.m., at Western Washington University, Old
12 Main 430G, at which time and place the Board heard the oral arguments of counsel with the
13 following Trustees present and constituting a quorum: Philip E. Sharpe, Jr. (acting as Chair),
14 Howard Lincoln, Kevin Raymond, John D. Warner, Grace Yuan, and Peggy Zoro. Advising
15 the Board in this matter was Assistant Attorney General Alan Smith.

16 10. On July 26, 2006, the Board of Trustees issued a Review Decision and Order
17 on Remand directing the Hearing Panel to reconsider whether the Petitioner should be
18 dismissed for cause. Specifically, the Board requested the Panel to apply to the Board's
19 factual findings the definition of a "malicious" act as one that is substantially certain to cause
20 harm and that is done without just cause or excuse or in reckless disregard of the law or of a
21 person's rights. See Review Decision and Order on Remand, at 45.

22 11. The Hearing Panel reconvened on September 7, 2006, and issued its Decision
23 on Remand on September 25, 2006. Having reconsidered the evidence, the Hearing Panel
24 found itself unable "to articulate a discernible impact on any faculty member's or student's
25 actual academic, scholarly, scientific or professional activities or achievements, whether of
26 tenure, graduation, grades, scholarships or otherwise, that is *both* 'intentional and malicious'"

1 within the meaning of the Faculty Handbook. Decision on Remand, at 5 (original emphasis).
2 Accordingly, the Panel concluded that grounds did not exist to terminate the Petitioner's
3 employment. The Panel reaffirmed its recommended sanctions and also recommended that
4 the Petitioner, as a condition of his continuing employment, be required to conduct
5 standardized teaching evaluations in all his courses.

6 **B. Findings Relating to Faculty and Staff**

7 Deborah Greer Currier

8 12. The Hearing Panel's findings of fact relating to Professor Deborah Greer
9 Currier are supported by a preponderance of the evidence and are hereby adopted with such
10 modifications as the Board finds appropriate to clarify and amplify the Panel's findings with
11 specific references to the hearing record.

12 13. Professor Currier came to the University in the fall of 2001 as an untenured
13 lecturer in the Theatre Arts Department. RP III 6-7. Professor Mills told her on her first day
14 as a faculty member that she had better keep her legs closed, because she could not be
15 expected to teach students the same way she got her doctorate. RP III 10, 29; EX 3.2. From
16 the fall of 2001 through about 2003, Mills on more than one occasion called her to her face a
17 "bimbo," a "slut," and on one occasion a "cunt." RP III 8; EX 3.2. These incidents occurred
18 in the workplace. RP III 8. A student also reported to Currier that Mills had called her a
19 sexually derogatory name. RP III 8. After about two years, having secured a tenure-track
20 position, Currier made it clear to Mills that she would not tolerate his sexual innuendo, and he
21 stopped any direct verbal abuse of her. RP III 31-32; EX 3.2.

22 14. Currier was offended by Mills's treatment of her. RP III 10. The name-calling
23 and sexual innuendo made her feel "degraded" and "angry." RP III 9. The fact that he was
24 tenured and she was not affected the way she responded to him. RP III 12. She took to
25 avoiding him. RP III 14, 32, 35, 40. She did not formally complain because as a new faculty
26 member she felt she could not step forward. RP III 9. It angered her that Mills's derogatory

1 | comments about colleagues and students put her in a position where students were looking to
2 | her for her reaction. RP III 17, 19. She believes that Mills's behavior adversely affected her.
3 | RP III 21. She was "incredibly intimidated, bothered, hurt and put off by it," although she did
4 | not allow it to affect her teaching or her career. RP III 23. However, she reported being
5 | fearful of Mills after finally addressing her concerns in a letter to Dean Carol Edwards in
6 | October 2004. RP III 21-22; EX 3.2. Currier cried when Edwards told her that she took her
7 | concerns seriously and would look into them. RP II 85.

8 | Gregory Pulver

9 | 15. The Hearing Panel's findings of fact relating to Professor Gregory Pulver are
10 | supported by a preponderance of the evidence and are hereby adopted with such modifications
11 | as the Board finds appropriate to clarify and amplify the Panel's findings with specific
12 | references to the hearing record.

13 | 16. Gregory Pulver became a classified staff member in the Theatre Arts
14 | Department in 1997, and obtained a tenure-track faculty appointment in 1999. RP III 41-42,
15 | 54. In an early conversation with Pulver, sometime in the fall of 1997, Mills referred to Pulver
16 | as "just a stupid faggot." RP III 55; EX 3.4. Pulver was shocked that a professional colleague
17 | would say that to him. RP III 55. Sometime later, in the spring or fall of 1998, Pulver told
18 | Mills that he would not tolerate his sexually offensive language, and Mills stopped insulting
19 | him to his face. RP III 55-56; EX 3.4.

20 | 17. Mills then took to referring to Pulver as "Precious" in a lilting way that was
21 | suggestive of Pulver's sexual orientation. RP III 45. A number of students reported to Pulver
22 | that Mills had referred to him in class as "Precious." RP III 45. At a professional meeting in
23 | Alaska, a theatre professional with whom Pulver had had no prior relationship said to him,
24 | "Oh, I heard that your nickname was Precious." RP III 45-46. Pulver was "incredibly
25 | embarrassed" by this. RP III 46.

1 18. Pulver felt "intimidated," "nervous," and "upset" by Mills's treatment of him.
2 RP III 42, 45. He was fearful of his aggressive behavior, the way he talked about students and
3 fellow faculty members, his use of violent language, "[t]he way people are stupid and he'd like
4 to kill them all, erase them from the world." RP III 43-44. Pulver has for several years
5 avoided any contact with Mills, even to the point of retreating to his office to keep from
6 encountering him in the hallway. RP III 42-43, 59. He wrote to Dean Carol Edwards after she
7 arrived at the University in the fall of 2004 that he felt unsafe in the situation he was in. RP III
8 42; EX 3.4.

9 Kay Reddell

10 19. The Hearing Panel's findings of fact relating to staff member Kay Reddell are
11 supported by a preponderance of the evidence and are hereby adopted with such modifications
12 as the Board finds appropriate to clarify and amplify the Panel's findings with specific
13 references to the hearing record.

14 20. Kay Reddell has served as the administrative assistant in the Theatre Arts
15 Department since 1997. RP III 65-66. Professor Mills has called her derogatory names on
16 more than one occasion and over a period of several years. RP III 67. On one occasion Mills
17 became very angry with her because she had not succeeded in finding him a student to help out
18 with his class. He said, "You're just a stupid bitch. You're just white trailer trash." RP III 70-
19 71. Reddell did not feel it was appropriate for her to be demeaned and yelled at by Mills. RP
20 III 68.

21 21. Professor Currier observed Kay Reddell in states of anger and frustration after
22 encounters with Professor Mills. RP III 17-18. Professor Pulver also observed Reddell to be
23 "incredibly upset," "distracted," and "shaken" following an interchange with Mills. RP III 50.
24 Pulver counseled Reddell to treat Mills "like a bad puppy and tell him that he has no business
25 speaking to her that way and that he needs to leave the office." RP III 51.

Mark Kuntz

22. The Hearing Panel made no findings of fact relating to Professor Mark Kuntz beyond finding that Mills has vigorously and repeatedly asserted that Kuntz's use of student course fees constituted criminal acts of theft and embezzlement. The Board hereby adopts such additional findings as are necessary to complete the record on review and to determine the issues before us.

23. Professor Kuntz was Chair of the Theatre Arts Department from June 1999 to September 2005. RP II 125-26. Professor Mills was not charged with any misconduct directed toward or concerning Mark Kuntz. EX 17. However, Mills, as part of his own case, introduced evidence of a dispute with Kuntz about student course fees in an apparent effort to show bias or improper motivation. RP II 51-53.

24. The dispute concerned fees charged to students enrolled in Theatre Arts 201, "Introduction to Cinema," a course taught by Mills. The fee was originally established to purchase films to be shown in the cinema course. EX 15. Films purchased with cinema course fees were kept in Wilson Library, where they also were made available to the campus community as a whole. RP II 199. Over time, the advent of less expensive videos and increased student enrollments in the cinema course resulted in a large accumulation of unspent funds. RP II 181; EX 15.

25. As Department Chair, Kuntz initially addressed the excess funds issue by reducing the amount of the cinema course fee. RP II 184-85; EX 15. He then sought to spend down the excess funds by purchasing video equipment for use by Theatre Arts students. RP II 183, 185; EX 15. This equipment was also made available for use by the campus community as a whole. RP II 185; EX 15. Student course fees continued to support the purchase of new videos for the cinema course. RP II 181. However, as other departmental funds were available to purchase any needed videos, Kuntz eventually proposed to eliminate the cinema course fee altogether. RP II 190-91; EX 15.

1 26. According to Mills, the excess funds were approaching \$20,000 as of October
2 2002. RP III 141; EX 12. Mills had developed his own plan for spending the course fees on
3 videos, and requested the library to proceed in accordance with his plan. RP III 139-42; EX
4 12. Kuntz was the department official designated to authorize expenditures of student course
5 fees. RP II 182; EX 22.16. Kuntz notified Mills that he had instructed the library staff to
6 disregard Mills's request pending further discussion of how the funds should be used. RP II
7 181-82; EX 13. The decision was later made to discontinue the cinema course fee and to use
8 other funding sources to maintain the video collection. RP II 191-92; EX 14.

9 27. Mills was "chapped" that Kuntz had frustrated all his hard work and "just
10 ripped the throat out of my program." RP III 141-42, 144, 168. According to him, he at that
11 point "instituted an internal audit for inquiry into misappropriation of funds or embezzlement."
12 RP III 142. It is unclear from the record exactly when or at whose behest an internal audit was
13 conducted, but a draft audit report was circulated by Internal Auditor Kim Herrenkohl in
14 January 2004. RP II 166-67; EX 9. The evidence does not establish whether Kuntz
15 improperly used student course fees to purchase video equipment. A general student course
16 fee policy dated April 27, 1999, states that "[s]tudent course fees are a means of supplementing
17 those consumable materials or services that tuition or state funds cannot cover." EX 4. A
18 policy specific to the College of Fine and Performing Arts for Fiscal Years 2001 and 2002
19 indicates that cinema course fees were to be used for videos, DVDs, and "film equipment." RP
20 IV 26-28; EX 24.2. There is no evidence that the Internal Auditor ever issued a final audit
21 report.

22 28. Mills nevertheless has adamantly and publicly maintained, and still maintains,
23 that Kuntz is a "thief" and an "embezzler." RP III 142-43. He hoped that his statements would
24 have a negative impact on Kuntz's reputation. He wanted Kuntz arrested for embezzlement.
25 He considered it his "onerous duty" to tell people outside his department and the University
26 that Kuntz had embezzled and stolen money. RP III 143. Mills was assiduous in the

1 performance of his self-assigned duty. Professor Currier heard Mills telling students that the
2 theatre faculty had put their trust in an embezzler and a liar. RP III 16-17, 23. Professor
3 Pulver and Kay Reddell both heard Mills publicly denouncing Kuntz as an embezzler, a cheat,
4 and a liar at a social function sponsored by the Bellingham Theatre Guild in May 2004. RP III
5 47-48 (Pulver); RP III 73-74 (Reddell); EX 16.

6 29. Kuntz was not surprised by Mills's statements about him. "It just seemed like
7 something Perry would do." RP II 153-54. He felt people would "just blow off" statements
8 like that "coming out of Perry's mouth." RP II 193. Kuntz did not believe Mills should be
9 stopped from criticizing his use of student course fees. RP II 193, 195. However, he was
10 concerned that Mills was making public statements that were hurting the reputation of the
11 department. RP II 193, 195. Kuntz made his concerns known to Linda Smeins, then Interim
12 Dean of the College of Fine and Performing Arts, in a memorandum dated May 28, 2004. RP
13 II 193; EX 16.

14 30. Professor Mills was suspended by Provost Andrew Bodman in October 2004 on
15 the recommendation of Dean Carol Edwards. RP II 62; EX 2.1, 3.1. Dean Edwards was new
16 to Western as of September 2004. RP II 84. Provost Bodman did not consult with Professor
17 Kuntz before ordering the suspension. RP II 78. Dean Edwards had consulted with Kuntz, RP
18 II 84-85, but was not aware that Mills had accused Kuntz of misappropriating student course
19 fees, RP II 102-04. There is no evidence that the student course fee issue was ever considered
20 in relation to the charges that were eventually brought against Professor Mills.

21 Other Faculty and Staff

22 31. The Hearing Panel made no specific findings relating to other faculty and staff,
23 although its Judgment assumes a pattern of repeated abuse of students, faculty, and staff alike.
24 Panel Decision at 9, 11. The Board hereby makes such findings of fact as are necessary to
25 complete the record on review and to determine the issues before us.

1 32. Professor Currier commonly heard Mills using derogatory terms at faculty
2 meetings in referring to other colleagues, calling them "'idiots,' 'maggots,' the usual." RP III
3 11. She heard Mills making derogatory comments about faculty members in other settings as
4 well. RP III 16-17. Two students reported to Currier that Mills told his writing class that, with
5 the exception of herself and Professor Germain, the Theatre Arts faculty were "total crap who
6 couldn't find their asses with both hands." RP III 17, 27; EX 3.2. Currier felt "relieved" when
7 Mills stopped attending faculty meetings. - RP III 12.

8 33. Professor Kuntz stated that Mills was disrespectful of colleagues "pretty much
9 all the time" at faculty meetings. RP II 128. Mills often ranted at faculty meetings about
10 killing people. RP II 129, 151-52. Kuntz and other colleagues did not intervene because they
11 were afraid of Mills. RP II 152. Professor Pulver said Mills used "aggressive" and
12 "slandorous" words at faculty meetings. RP III 44. Colleagues would stop talking when Mills
13 talked and were reluctant to interact with him because of his argumentative nature. RP III 44-
14 45. Kay Reddell attended and took minutes of departmental meetings. RP III 69. At those
15 meetings Mills would get angry and would yell at colleagues or upset them in some way, often
16 calling them derogatory names. RP III 69-70.

17 34. Sylvia Tag was the library liaison assigned to work with the Theatre Arts
18 Department. RP III 127. Mills said derogatory things to her about Professor Kuntz and others.
19 RP III 129-30. Conversations with Mills "generally would degenerate into talking about other
20 people," and Tag was not very good at asking him to stop. RP III 130. She observed that other
21 library staff members avoided Mills. RP III 133. Mills became less of a problem for Tag after
22 she asked him what kind of things he might be saying about her. RP III 131.

23 **C. Findings Relating to Students**

24 [REDACTED]
25 35. The Hearing Panel's findings of fact relating to student [REDACTED] are
26 supported by a preponderance of the evidence and are hereby adopted with such modifications

1 as the Board finds appropriate to clarify and amplify the Panel's findings with specific
2 references to the hearing record.

3 36. [REDACTED] was a Theatre Arts student who graduated in the spring of 2005.
4 RP II 154, 155. In the fall of 2004, she gave Department Chair Mark Kuntz a written
5 complaint about Professor Mills. RP II 154-55; EX 3.5. Professor Kuntz forwarded her
6 complaint to Carol Edwards, Dean of the College of Fine and Performing Arts, on or about
7 October 12, 2004. RP II 84; EX 3.5.

8 37. [REDACTED] had been diagnosed in the fall of 2003 with ovarian cancer and had to
9 leave Western for surgery and chemotherapy. RP III 135, 207; EX 3.5. She returned in the
10 spring of 2004 and enrolled in Mills's dramatic writing class, a requirement for her major. RP
11 III 135-36; EX 3.5. She was not fully recovered, was still bald from chemotherapy, and faced
12 her insecurities every day. RP II 207; EX 3.5. At first she volunteered, but then expressed
13 reticence about presenting a playwriting piece in class. RP III 136; EX 3.5. In response, Mills
14 stated, [REDACTED] "if you can't even put up your piece for class then you should have just died of
15 cancer" or words to similar effect. RP III 137; EX 3.5. Her eyes welled up with tears and her
16 classmates stared as she cast her work and put it up. EX 3.5.

17 38. Professor Mills testified that he said something to [REDACTED] like, "If you don't put
18 up your work, it's just as if you died of cancer and aren't here at all." RP III 137. He
19 acknowledged that his words were hard and that [REDACTED] appeared upset by what he said, but he
20 did not think his words were rude or cruel. RP III 137. He justified his words as "an attempt
21 to motivate her to consider that art is worth putting yourself out for, and if we don't produce
22 art, it's just as if we never had existed." RP III 137. He said he apologized to [REDACTED] afterward
23 for having to "bend her arm, but it worked." RP III 137-38. Mills's testimony on this point
24 proves only that he remains oblivious to the fact that he, more probably than not, could have
25 motivated [REDACTED] without being cruel to her. As [REDACTED] indicated, while Mills succeeded in
26 getting her to put up her work, his approach was "entirely inappropriate." EX 3.5.

1 [REDACTED]
2 39. The Hearing Panel found that no specific set of facts were proved relating to the
3 complaints of student [REDACTED]. While the Board agrees with the Panel that several
4 witnesses testified and had different perceptions and recollections of what occurred, we find no
5 significant inconsistencies in their testimony. We therefore make such findings of fact as are
6 necessary to complete the record and to determine the issues before us.

7 40. [REDACTED] was a senior at Western at the time of the hearing. She took
8 Theatre 201 from Mills in the fall of 2004. RP III 77. On October 7, 2004, she parked in the
9 faculty lot where she and her boyfriend encountered Mills and a small group of male students.
10 RP III 77-78; EX 1.1. Mills and the students were standing on or near a sidewalk along the
11 back of the performing arts center. RP III 82. [REDACTED] had a Bush/Cheney bumper sticker on
12 her car. RP III 78. Mills made some statement to the effect that by voting for Bush, [REDACTED]
13 wanted the world to die and probably wanted him put to death, and that he probably would be
14 arrested for starting something. RP III 78; EX 1.1. [REDACTED] felt that Mills's statements were
15 belittling and disrespectful. RP III 79-80.

16 41. [REDACTED] felt she could not respond to Mills because she was enrolled in his
17 class and her boyfriend would be taking his class the next quarter. RP III 78. [REDACTED]
18 credibly testified that she was afraid of being "pinpointed" in class the way she had seen other
19 students treated. RP III 78. She mentioned one class in which Mills referred to Puyallup
20 residents as "white trash." The comment offended her because she is from that area. RP III
21 79. In another class, Mills shouted "Shut up, girl" to a student. [REDACTED] felt badly for her.
22 RP III 79. [REDACTED] complained to the Provost because Mills's treatment of her and other
23 students made her feel uncomfortable and intimidated. RP III 78, 79; EX 1.1.

24 42. [REDACTED] was one of the students with Mills when [REDACTED] parked in the
25 faculty lot. RP IV 37. Mills and the students were all making "side comments" prompted by
26 her Bush/Cheney bumper sticker. RP IV 37-38. Mills also made some joke that [REDACTED]

1 does not remember about sinking [REDACTED] car in the La Brea Tar Pits. RP III 87; RP IV 39.
2 [REDACTED] did not say anything in response to any of the comments made by Mills and the other
3 students; she just walked off with "a pissed off sort of face." RP IV 40. [REDACTED] and his
4 friends decided that [REDACTED] boyfriend was "cool," however, because he exchanged a few
5 words with Mills about their mutual taste for cigars. RP IV 40-41.

6 [REDACTED]
7 43. The Hearing Panel's findings relating to [REDACTED] and the October
8 2004 incident involving the classroom display of a knife generally pertain to matters that are
9 extraneous to the Statement of Charges. Because our review of the record reveals evidence
10 that the Panel did not adequately consider, the Panel's findings relating to [REDACTED]
11 are not adopted, and the Board substitutes such findings as are necessary to determine the
12 issues as framed by the Statement of Charges.

13 44. On or about October 6, 2004, Dean Edwards forwarded to Provost Bodman a
14 memorandum from Department Chair Mark Kuntz regarding the display of a knife by
15 Professor Mills in a classroom setting. RP II 73, 107. [REDACTED] was a student in
16 Mills's playwriting class. RP III 91. As she was leaving class, she saw Mills displaying a
17 knife to two or three other students. RP III 92-93. She told Professor Kuntz what she saw
18 because she felt uneasy about it. RP III 93. She did not observe the other students to react in
19 any way, but Mills's display of a knife made her feel unsafe. RP III 97. It seemed
20 inappropriate to her that Mills was displaying a knife in a classroom setting. RP III 93.

21 45. [REDACTED] the student who testified about the incident involving [REDACTED]
22 [REDACTED] was also one of the students to whom Mills was showing his knife. RP IV 41. [REDACTED]
23 [REDACTED] another student in the class, was writing a play about *Lord of the Rings* and wanted to
24 cast [REDACTED] as Gimli the Dwarf. RP IV 41-42. [REDACTED] asked [REDACTED] if he had a knife he
25 could use as a prop. RP IV 42. [REDACTED] responded that Mills had a knife and they could just
26 use his. RP IV 43. [REDACTED] testified to similar effect, stating that he had cast [REDACTED] as "a

1 rather rude Hells Angel type” and needed a “large, ugly looking knife.” RP IV 57. According
2 to [REDACTED], Mills overheard them and volunteered the use of his knife. RP IV 57.

3 46. Mills took out his knife and, according to [REDACTED] said something to the effect
4 that you should use a sausage instead of a knife if you’re doing *Henry VIII*, because someone
5 will go tell the department chair. RP IV 43, 51. [REDACTED] knew Mills had been in trouble
6 before for showing a knife in class. RP IV 44, 47. So [REDACTED] was thinking, “If there’s
7 anyone in this class who doesn’t like him, they’re going to, like, go and run up and tell Mark
8 Kuntz.” He then turned around and saw [REDACTED] RP IV 44-45. Dean Edwards said
9 [REDACTED] came to her afterwards because he was concerned that he may have gotten Mills
10 into trouble. RP II 120. [REDACTED] told Edwards that Mills’s display of a knife might have been
11 disturbing to other students, but he did not see it the same way. RP II 121.

12 47. [REDACTED] described Mills’s knife as “larger than a Swiss Army knife.”
13 RP III 92. Mills said his knife probably has a four-inch blade. RP III 114. [REDACTED] said
14 Mills wore the knife on a clip on his waistband. RP IV 43. University policy prohibits the
15 possession of weapons on campus. RP IV 77; WAC 516-52-020(1). James Shaw, Director of
16 Public Safety and Chief of Police, indicated that the policy would prohibit carrying a knife
17 with a lockable blade over three and a half inches. RP IV 80.

18 48. In October 2000, in response to a previous student complaint, Kuntz had
19 admonished Mills in writing regarding his display of a knife in class. RP II 143-45; RP III
20 111; EX 7. In September 2001, Kuntz had again warned Mills in writing that he was not to
21 come to campus with weapons on his person. EX 19. The Theatre Arts faculty and staff also
22 addressed a letter in September 2001 to then Dean Bertil van Boer expressing their “real and
23 tangible fear” occasioned by Mills’s carrying of a registered firearm and a large knife on
24 campus and in the classroom, together with his belligerent rants about killing people who
25 offended him. RP II 95; RP IV 50; EX 5. Dean van Boer, after consulting with the Provost,
26 warned Mills that he should not carry weapons on campus. RP IV 50.

1 Other Students

2 49. The Hearing Panel made certain findings relating to other students that are
3 supported by a preponderance of the evidence and that are hereby adopted with such
4 modifications and additional findings as are necessary to complete the record on review and to
5 determine the issues before us.

6 50. Professor Currier at times heard Mills in conversations with students refer to
7 various students in Currier's classes as "shit for brains," "blondies," and one overweight
8 student as "a 400-pound canary who warbles nothingness" and "makes him sick." RP III 18;
9 EX 3.2. The student targets of these remarks would sometimes learn about them from other
10 students and become upset. RP III 18-19; EX 3.2. Currier also served as an academic advisor
11 to drama and education students. RP III 14. Students, mostly women, came to her fairly
12 regularly, as many as four each quarter, complaining of Mills's treatment of them. RP III 14-
13 15, 37, 39. Their complaints included Mills's use of "tag words" such as "stupid liberals" and
14 "privileged white kids" who were "just sucking on Momma's teat." RP III 15, 39. Many
15 students cried when they came to see Currier. RP III 15. Currier referred them to Department
16 Chair Mark Kuntz to request waivers from Mills's courses. RP III 15-16. Currier reported her
17 concerns to Dean Carol Edwards in October 2004 because she wanted to put a stop to Mills's
18 mistreatment of students. RP III 25-26; EX 3.2.

19 51. Professor Pulver "all the time" heard Mills using obscenities and derogatory
20 language directed at or concerning students, including his favorite "F word," as in "fucking
21 lazy girl." RP III 46, 52. Pulver received numerous complaints from students in Mills's
22 classes, mostly female, some of them in tears. RP III 48-49. Pulver counseled female students
23 not to cry in front of Mills, because "he would find your soft spot and he would go after that
24 again and again." RP III 49. He advised gay students who might have to take a class from
25 Mills to sit in the back and keep quiet. RP III 62. Pulver found it "nauseating" to have to give
26 them such advice. RP III 62.

1 52. Kay Reddell supervised nine student office assistants and frequently had other
2 students in the office needing some kind of assistance. RP III 66. Mills would yell at the
3 office assistants or would yell at Reddell in front of students. RP III 68. Students in Mills's
4 classes or student assistants would come to Reddell upset and crying after being verbally "beat
5 up" by Mills. RP III 68-69. She recalled one instance in the spring of 2004 when Mills
6 became very angry with a student assistant who had failed to return a film to the library. Mills
7 was in the office screaming at the student and saying inappropriate things about her. RP III 71-
8 72. Professor Kuntz overheard these remarks from his office. RP II 157; RP III 72. He
9 testified from contemporaneous notes that Mills said, "You bitch, you screwed up." RP II 157-
10 58. Then he said, "I would understand if she were missing a leg" and "Is she retarded?" RP II
11 158. Other students were present during this outburst. RP II 158.

12 53. Professor Kuntz said the department was always in a "repair mode" trying to
13 solve the "Perry issue." RP II 129, 130. At the request of then Department Chair Thomas
14 Ward, Kuntz began teaching a playwriting class as an alternative for students who objected to
15 taking the class from Mills. RP II 129-30, 169. Kuntz also stated that "playing buffer for
16 students who were upset by Perry . . . has been a part of how we live in the Theatre
17 Department." RP II 130. Kuntz was always receiving student complaints about Mills, "pretty
18 much every quarter." RP II 137. While some students had typical unfair grading complaints,
19 others, mostly women, were complaining of derogatory language and being called names in
20 class. RP II 203, 204. The students were afraid of pressing a formal grievance against Mills.
21 RP II 204-05.

22 54. Several students testified in support of Professor Mills. [REDACTED], a 2000
23 graduate, took five or six classes from Mills. RP IV 18. He wrote a letter at the time praising
24 Mills to then Dean Bertil van Boer. RP IV 19; EX 20. In [REDACTED]'s experience, Mills did not
25 pick on anyone in particular. He felt it was established that anyone was a target. "It's like
26 *South Park*; there's no sacred cows." RP IV 26. [REDACTED] took a cinema class from Mills

1 in the fall of 2004. RP IV 30. He said "[Mills] was pretty outrageous, and I think he liked to
2 use shock value to get his students to listen." RP IV 31. [REDACTED] had a couple of friends in
3 class who also liked the "cool" things Mills said in class. RP IV 32. [REDACTED] said Mills was
4 "pretty much an equal opportunist griper; he would pick on pretty much everybody." RP IV
5 33.

6 55. [REDACTED] said he knew Mills well enough to understand that he did not take
7 "direct pot shots at you," but was just trying to motivate you. RP IV 48. He said there were
8 occasions when Mills used a characteristic like gender or sexual preference as a way of
9 targeting students to motivate them. RP IV 50. He said Mills called him "Fat Boy," but that
10 did not bother him. RP IV 50. He said other students are not as strong as he and did not really
11 understand "subtext" or "context." RP IV 50. To them, Mills was "just an old curmudgeon."
12 RP IV 51. A lot of students told [REDACTED] they were "scared to take Perry's class." RP IV 53.
13 Asked whether they were afraid of receiving a bad grade or being embarrassed in class,
14 [REDACTED] answered, "Well, I think a little of both." RP IV 53.

15 56. The evidence supports a finding that Professor Mills appealed to a core group of
16 students who are steadfastly loyal to him. Exhibit 25 consists of 22 supportive letters, half of
17 which appear to have been solicited in connection with Mills's unsuccessful bid for a
18 promotion in 1998. The tenor of these letters is highly laudatory of Mills's teaching. Exhibit
19 26, on the other hand, consists of six student complaints over a period ranging from fall 1998
20 through spring 2004. These letters strike a markedly different but consistent tone.

21 57. One student, [REDACTED], complained in April 2004 that Mills spends
22 class time "spouting off" on why "youth are so stupid and why Christians, particularly
23 Catholics, are the worst people on the planet." EX 26.1. [REDACTED] complained that Mills flat
24 out calls his students stupid. EX 26.1. When one student was absent from class, Mills
25 informed the entire class how happy he was the student was not there. EX 26.2. Another
26

1 student related to [REDACTED] that when he questioned something Mills had said about
2 Christianity, Mills told him he should be castrated. EX 26.2.

3 58. [REDACTED] complained in December 2002 that Mills showed little
4 respect for students, lecturing them in a degrading and offensive way. EX 26.3. The student
5 requested that his identify not be revealed to Mills because his grade was still at Mills's
6 discretion. EX 26.4. [REDACTED] wrote in December 2000 that Mills's lectures had little to do
7 with the films shown in class and more to do with the stupidity of his students and criticism of
8 the Catholic Church. She said students were not willing to speak up in class because Mills
9 called them stupid if they disagreed with his views. EX 26.5.

10 59. [REDACTED] writing in November 1998, asked to be withdrawn from Mills's
11 class without penalty, complaining that Mills was demeaning and intimidating to students,
12 using harsh profanities and telling them they were stupid. She said many students, including
13 herself, never offered their thoughts in class for fear of being told how stupid or ridiculous they
14 were. EX 26.8. A "concerned student," also writing in November 1998, complained that Mills
15 made demeaning comments about women, continually told students how stupid they were, and
16 went on to demean faculty colleagues. Among other things, Mills told students to "buy your
17 moms skimpy dresses and a motorcycle and then send them to me, but first they have to be
18 naked." The student was afraid to discuss these concerns with Mills for fear of him "cursing
19 obscenities" at the student. EX 26.9. Another student, [REDACTED] complained that Mills
20 insulted the intelligence of students, frequently made sexual comments, and generally taught in
21 a degrading manner. She indicated that she was dropping the class for those reasons. EX
22 26.10.

23 60. Even the letters from students who were supportive of Mills tend to bear out the
24 complaints of those who were not. [REDACTED] for example, noted with approval the
25 "comedic and shocking" nature of Mills's lectures and berated fellow students for their lack of
26 maturity. EX 25.4. [REDACTED] liked Mills's classes because his honesty seemed so harsh to

1 | some students that they actually dropped the class and then she did not have to be in class with
2 | a bunch of people who just wanted a "baby sitter" for a teacher. EX 25.6. [REDACTED] liked
3 | Mills's "colorful antics" and his willingness to admonish those who were lazy or "merely
4 | stupid." EX 25.7. [REDACTED] likewise thanked Mills for not tolerating "stupidity and
5 | ignorance." EX 25.9.

6 | 61. [REDACTED] perhaps summed it up best when she wrote appreciatively to
7 | Mills: "I hope you are doing well, and that there are a few gems amongst the shithheads and
8 | cretins in your classroom every now and again. Also in the department. Good lord." EX 25.8.
9 | These and other student comments in praise of Mills reflect an easy familiarity with Mills's
10 | evident penchant for engaging favored students in his pastime of belittling and speaking ill of
11 | other students and faculty members.

12 | **D. Findings Relating to Notice**

13 | 62. The Hearing Panel made only generalized findings relating to what notice
14 | Professor Mills may have been given in the past concerning the propriety of his behaviors.
15 | Accordingly, we make such additional findings as are necessary to complete the record and to
16 | determine the issues before us.

17 | 63. Dean Carol Edwards saw an "ongoing problem" with Professor Mills as
18 | indicated by his personnel file and the current complaints about him. RP II 94. In her view,
19 | Mills's actions had impacted the department for years. RP II 97. She stated that "people have
20 | tiptoed around, not engaged in the type of activities that faculty members engage in and
21 | collegial work environment in which everybody is comfortable and safe." RP II 97. She
22 | indicated that the faculty members who came forward with complaints were fearful of
23 | retaliation. RP II 98. As the new Dean, Edwards was not surprised that faculty members
24 | would bring unresolved issues from the past to her attention. RP II 105-06.

25 | 64. Professor Mills was denied a promotion to the rank of Professor in 1998-99. RP
26 | III 102; EX 18. Then Department Chair Thomas Ward recommended against a promotion

1 based in part on demonstrated weaknesses in the areas of teaching and service. EX 18.
2 Weaknesses in teaching included using foul language with and toward students, employing a
3 combative teaching style, discussing other faculty members with students in a derogatory and
4 demeaning manner, enjoying his wit at the expense of students, and berating and demeaning
5 students in the guise of humor. Also cited was an extremely high student complaint rate. EX
6 18.2-18.3. Weaknesses in service included using foul language with and toward theatre faculty
7 and staff, employing a combative tone with faculty members, and berating and demeaning
8 colleagues in the guise of humor. EX 18.3.

9 65. In October 2000, Department Chair Mark Kuntz admonished Mills in writing
10 about his making of off-color remarks concerning colleagues, women, gay students, and
11 minority populations. RP II 145; EX 7. The letter directed Mills's attention to Section 2 of the
12 Code of Faculty Ethics, where it is stated that "faculty avoid and condemn sexual harassment,
13 intimidation, and exploitation of students." RP II 145; EX 7.1-7.2. The letter further informed
14 Mills that the Faculty Handbook required the adherence of faculty members to the Code of
15 Faculty Ethics. EX 7.2. The letter concluded by warning Mills that "[y]our behavior must
16 change." EX 7.2.

17 66. In September 2001, Kuntz addressed to Mills what he described as "third in a
18 series of memos and another in a line of communications we have had concerning your
19 behavior." EX 19. The letter lamented that Kuntz's continued attempt to remedy a substantial
20 problem had been received with deaf ears. While acknowledging Mills's free speech rights,
21 the letter admonished Mills as follows: "Your behavior scares people. You know it. Your
22 repeated need to express your desire to 'kill' people is not appropriate, and will stop . . . Your
23 lack of sensitivity or care about the needs of students, staff, and colleagues must stop." The
24 letter concluded by requesting a meeting with Mills to work out a strategy for ensuring that
25 Mills would come to work unarmed, make a concerted effort to be collegial, and generate a
26

1 communication approach that allowed for his free speech rights while taking into account the
2 individual rights of others.

3 **E. Findings Relating to Petitioner's State of Mind**

4 67. The Hearing Panel, in Part A of its Judgment, made certain factual findings
5 relating to Professor Mills's state of mind that are supported by a preponderance of the
6 evidence and that are hereby adopted with such modifications and additions as the Board finds
7 necessary to clarify and complete the record and to determine the issues before us. However,
8 we do not adopt certain other findings that the Hearing Panel made based on demeanor
9 evidence. Nor do we adopt as findings those portions of the Panel's Judgment that are
10 properly set forth as conclusions of law.

11 68. Mills admitted using derogatory terms toward faculty colleagues and said he
12 had done so for the last five years. RP III 103. Yet he did not recall telling Professor Currier
13 to keep her legs closed or calling her sexually derogatory names. RP III 115, 144. He
14 nevertheless suggested that Currier may have contributed by acting in a certain way. RP III
15 163-64. Mills also did not recall calling Professor Pulver a faggot, but said it would not
16 surprise him if he did. RP III 134. He could not recall calling Kay Reddell a stupid bitch. RP
17 III 138.

18 69. Mills was familiar with the 1998 memorandum from then Department Chair
19 Thomas Ward recommending that he be denied a promotion to Professor. RP III 145; EX 18.
20 Yet he denied having been put on notice that parts of his behavior were not acceptable. RP III
21 147. He denied berating and demeaning students and colleagues. RP III 147. He denied using
22 humor to belittle students and others. RP III 177. He brushed off the concerns raised by Mark
23 Kuntz in 2001 about his talk of killing people. RP III 148; EX 19. He dismissed concerns that
24 his behaviors frightened people, insisting that nobody was afraid of him. RP III 173-75.

25 70. Mills suggested that he might do again what he did to [REDACTED], even
26 though he acknowledged that his behavior toward her was "brutal." RP III 154-55. He

1 justified his "casual attitude toward Anglo-Saxon words" as something he just picked up from
2 his students who talk that way. RP III 160. He denied any responsibility for his behaviors. RP
3 III 160. He did not know whether having tenure allowed him to use derogatory language
4 toward faculty and students. RP III 161. He summed up the witnesses against him as "a bunch
5 of people who didn't think [what he said] was funny when I did." RP III 164.

6 71. Professor Mills often behaves in a manner that is aggressive. He regularly
7 provokes students and others. Mills knows that his actions and comments induce stress and he
8 intends both the good and the bad consequences of his verbal acts. He knowingly and
9 intentionally engages in these acts. He engages in such conduct in part for the purpose of
10 stimulating students to rise above themselves, separating those students he considers good
11 from those he considers bad. His behavior is not, however, simply a matter of pedagogical
12 technique, nor does he use it selectively or judiciously solely to teach. Provocation is part of
13 his personality. Provocation is characteristic of his customary approach to faculty, students,
14 and staff alike.

15 72. Professor Mills knows, understands, and even expects that some recipients of
16 his words will be deeply upset and disturbed, and that not all of them will be able to respond
17 positively to his challenge. While on occasion he truly may not have formed a prior specific
18 malice for the particular person to whom he is then uttering his words, he shows continuing
19 disrespect to that class or group of persons he knows always to be present, those who are not
20 able to or choose not to rise to his challenge, often for fear of retribution.

21 II. CONCLUSIONS OF LAW

22 A. Governing Law and Jurisdiction

23 1. This is an adjudicative proceeding governed by the Administrative Procedure
24 Act, chapter 34.05 RCW ("APA"), and by Articles XV, XVI, and XVII of the Western
25 Washington University Faculty Handbook. This Board sits in its quasi-judicial capacity and
26 constitutes the University's "reviewing officers" for purposes of RCW 34.05.464.

1 2. The Petitioner is a tenured faculty member covered under and subject to the
2 provisions of the Faculty Handbook. Handbook, Art. II § C. The petition for review seeks
3 review of a proposed "severe sanction," was timely filed, and is otherwise proper. Art. XVII
4 § 4.a. This Board has jurisdiction over the person and subject matter herein.

5 **B. Standards of Review**

6 3. Both the Hearing Panel Decision and the President's Decision are before the
7 Board for review. Art. XVII § 3. Also before us is the Hearing Panel's reconsidered Decision
8 on Remand. Art. XVII § 4.c. The Board's review is to be "primarily based on the record of
9 the panel hearing," and no new evidence may be considered. Art. XVII § 4.a. The University
10 through its Provost bears the burden of proof by a preponderance of the evidence considered
11 as a whole. Art. XVII § 2.1.

12 4. Our review is *de novo* both as to findings of fact and conclusions of law.
13 Pursuant to RCW 34.05.464(4), we exercise all the decision-making power that we would
14 have had to decide and enter the final order had we presided over the Panel hearing, except to
15 the extent that the issues subject to review are limited by a "provision of law" or by us upon
16 notice to the parties.

17 5. We accept that the Faculty Handbook, Art. XVII § 4.b, may be regarded as a
18 "provision of law" for purposes of RCW 34.05.464(4). There it is provided that the Board
19 shall make one of the following determinations: (1) affirm the Panel's decision; (2) reverse or
20 amend the Panel's decision; or (3) remand for further proceedings. Any decision to reverse,
21 amend, or remand must be based on findings by the Board that (1) the Panel's decision was
22 arbitrary or capricious; (2) the procedures followed by the Panel in reaching its decision were
23 materially and prejudicially unfair or not in accordance with the law or University rules or
24 regulations; or (3) the Board's review has revealed the importance of evidence which the
25 Panel did not adequately consider.

1 6. The conclusion that our review is *de novo* is not limited by the provisions of
2 Art. XVII § 4.b. The term “decision” as used in Art. XVII § 4.b refers to the Hearing Panel’s
3 ultimate recommendation regarding the imposition of sanctions. While the Board must either
4 affirm that decision, reverse or amend the decision, or remand for further proceedings,
5 nothing in Art. XVII § 4.b limits the Board’s authority under RCW 34.05.464(4) to make its
6 own factual findings and legal conclusions in reaching its decision to affirm, reverse or
7 amend, or remand. The APA affirmatively requires us to make such findings and conclusions.
8 RCW 34.05.461(3). The Petitioner implicitly concedes that our review is *de novo* to the
9 extent that he requests us both to find that the Panel’s conclusions are not supported by the
10 evidence and to reverse the Panel’s decision. We do not “reverse” a factual finding or legal
11 conclusion; we reverse a “decision” or “judgment.” The Petitioner does not explain how we
12 could reverse the Panel’s decision without modifying its findings or conclusions as necessary
13 to conform to our substituted judgment.

14 7. We reject the argument of Petitioner’s counsel, advanced during oral argument,
15 that our review of legal questions is somehow limited by the “arbitrary and capricious”
16 standard under Art. XVII § 4.b. Agency action that is “arbitrary and capricious” includes
17 action that is erroneous as a matter of law. Helland v. King County Civil Service
18 Commission, 84 Wn.2d 858, 863 (1975); Matter of Stockwell, 28 Wn. App. 295, 302 (1981).
19 Our review of legal questions, including the application of law to the facts, is thus *de novo* and
20 is not limited by Art. XVII § 4.b.

21 8. We likewise reject the argument that Art. XVII § 4.b limits our review of
22 factual findings. The standard there set forth permits us to amend the Panel’s decision if our
23 review of the record reveals the importance of evidence that the Panel did not “adequately
24 consider.” Petitioner urges us to conclude that we can modify the Panel’s factual findings
25 only if we find important evidence that the Panel did not consider at all. As discussed, the
26 Petitioner confuses the Board’s authority under the Faculty Handbook to modify the Panel’s

1 decision and the Board's authority under the APA to modify factual findings. We decline for
2 any purpose to read the word "adequately" out of the standard set forth in Art. XVII § 4.b. If
3 "adequate consideration" of the evidence is to mean anything, it necessarily provides for *de*
4 *novο* review of factual findings by the Board.

5 9. Our review of factual findings and legal conclusions is limited by Art. XVII §
6 4.b only to the extent that we are required to make certain findings as set forth in the Faculty
7 Handbook if our decision is to reverse, amend, or remand the Panel's decision. Further, any
8 decision by the Board to reverse or amend the Panel's decision without remanding for further
9 proceedings must include a finding that, and an explanation as to why, further proceedings are
10 not advisable.

11 C. Standards for Imposition of Severe Sanctions

12 10. Review by the Board of Trustees is available only when a faculty member is
13 subject to the imposition of a "severe sanction." Art. XVII § 4.a. A severe sanction includes
14 dismissal for cause. Art. XVII. Severe sanctions other than dismissal "are those that involve
15 reduction in salary or temporary suspension with or without pay." Art. XVI.

16 11. Initially we must address the Petitioner's contention that the Provost cannot
17 "appeal" the President's recommendation affirming the Hearing Panel's recommendation of a
18 suspension rather than a dismissal. The Faculty Handbook provides that *either party* may
19 appeal a Hearing Panel decision to the President. Art. XVII § 3.a. At the next level of
20 review, the Handbook provides that the President, *upon request of the faculty member*, will
21 transmit the hearing record to the Board of Trustees. Art. XVII § 4.a.

22 12. The present appeal is properly before the Board "upon request of the faculty
23 member." In response, the Provost asks the Board to review the record and to conclude that
24 dismissal is the appropriate remedy. The Provost made the same request of the Hearing Panel
25 and of the President. Since the Board's review is *de novo*, the Provost's renewed request is
26 not improper. The Board is not bound by the recommendations of the Hearing Panel or the

1 President. We may substitute our judgment for theirs, with or without the Provost's request
2 that we do so.

3 13. Adequate cause for the imposition of a severe sanction, including dismissal for
4 cause, is defined in Art. XV § F. See Art. XV § F.B; Art. XVI; Art. XVII. In pertinent part,
5 "[a] faculty member covered under the Faculty Handbook may be dismissed for cause from
6 his or her position only for one or more of the following reasons:

7 (1) [a] serious and persistent neglect of faculty duties . . . [and/or] . . .

8 (5) [i]ntentional and malicious interference with the scientific, scholarly,
9 and academic activities of others."

10 Art. XV § F.B. In pertinent part, those same conduct standards define adequate cause for
11 severe sanctions other than dismissal. Art. XVI. We will refer to these conduct standards
12 respectively as the § F.B(1) "neglect of faculty duties" standard and the § F.B(5) "intentional
13 and malicious interference" standard.

14 14. The "intentional and malicious interference" standard under § F.B(5) is a
15 substantive conduct standard that is not be confused with an overarching standard under Art.
16 XV § F.A for determining whether faculty misconduct under § F.B warrants dismissal for
17 cause. Under Art. XV § F.A, to warrant a dismissal for cause where the faculty member's
18 conduct is alleged to have adversely affected another person, the conduct must "in an
19 *intentional and malicious way*" adversely affect the other person's ability to carry out his or
20 her academic, scholarly, or professional University responsibilities. To warrant a severe
21 sanction other than dismissal, the conduct must "in a *substantial way*" affect the other
22 person's ability to carry out his or her academic, scholarly, or professional rights or
23 responsibilities. Art. XVI.

24 15. The Faculty Handbook does not define the terms "intentional" and
25 "malicious." Nor did we find that the Hearing Panel was guided by any clear definitions of
26 those terms. Consequently, we were unable to ascertain how the Panel reached the conclusion
that the Petitioner's conduct toward others was often "intentional," but not "malicious." Clear

1 definitions are essential both for the purpose of determining whether a faculty member's
2 conduct violates the § F.B(5) "intentional and malicious interference" standard and for the
3 independent purpose of determining under § F.A whether faculty misconduct under § F.B
4 warrants dismissal for cause where the misconduct is alleged to have adversely affected
5 another person.

6 16. We construe undefined terms in the Faculty Handbook in their ordinary sense
7 with reference to a standard dictionary. Miller v. City of Tacoma, 138 Wn.2d 318, 327
8 (1999). An "intent" is the mental resolution or determination to do some act, and an
9 "intentional" act is done with the aim of carrying out the act. Black's Law Dictionary (7th Ed.
10 1999). A "malicious" act, or an act done with "malice," is one that is substantially certain to
11 cause injury and that is done without just cause or excuse or in reckless disregard of the law or
12 of a person's rights. Id.

13 17. The University through its Provost alleges that the Petitioner's conduct
14 violated both the § F.B(1) "neglect of faculty duties" standard and the § F.B(5) "intentional
15 and malicious interference" standard and that such conduct adversely affected other persons.
16 We must therefore consider the application of the terms "intentional" and "malicious" to each
17 of these standards.

18 18. If we find under § F.B(1) that the Petitioner's conduct constituted "a serious
19 and persistent neglect of faculty duties," we must then apply the above definitions of
20 "intentional" and "malicious" to determine whether the conduct interfered in an intentional
21 and malicious way with the other persons' ability to carry out their academic, scholarly, or
22 professional responsibilities. If it did, the Petitioner may be dismissed for cause. If it did not,
23 we then must consider whether the conduct interfered in a substantial way with the other
24 persons' ability to carry out their academic, scholarly, or professional responsibilities. If it
25 did, the Petitioner may be subjected to severe sanctions other than dismissal, such as the two-
26 quarter suspension recommended by the Hearing Panel.

1 19. Under § F.B(5), however, we initially apply the definitions of “intentional” and
2 “malicious” directly to the substantive conduct standard to determine whether a violation
3 occurred. If we find, applying those definitions, that the conduct constituted “intentional and
4 malicious interference with the scientific, scholarly, and academic activities of others,” we
5 then inquire whether the conduct adversely affected the ability of others to carry out their
6 responsibilities in an “intentional and malicious way” (warranting dismissal for cause) or in a
7 “substantial way” (warranting severe sanctions other than dismissal).³ We therefore agree
8 with Petitioner’s counsel that a violation under § F.B(5) always requires proof of intentional
9 and malicious interference, because that is an essential element of the conduct standard itself.
10 However, we reject Petitioner’s argument that a violation of the § F.B(1) neglect of duties
11 standard also requires proof of intentional and malicious interference. Such proof is required
12 under §§ F.A and F.B(1) only when the proposed sanction is dismissal for cause.

13 20. One further distinction must be drawn between the § F.B(1) neglect of duty
14 standard and the § F.B(5) malicious interference standard. A violation of § F.B(1) requires
15 that the neglect of faculty duties be both serious and persistent. The element of persistence
16 requires that the violation be shown to have occurred repeatedly over time. In contrast, a
17 violation of § F.B(5) may be predicated upon a single instance of intentional and malicious
18 interference with the scientific, scholarly, or academic activities of others.

19 21. We next address the Petitioner’s contention that a violation of the § F.B(1)
20 neglect of duties standard cannot be based upon violations of the Code of Faculty Ethics. As
21

22 ³ The Hearing Panel, in its Decision on Remand, at 3-4, concludes that conduct alone is never sufficient
23 for the imposition of sanctions. Thus, if the alleged conduct is “intentional and malicious interference with the
24 scientific, scholarly, and academic activities of others,” Art. XV § F.B.5, and if such conduct is alleged to have
25 adversely affected another person, then, in order to warrant dismissal for cause, “the impact of the faculty
26 member’s behavior must have affected the other person’s ability to carry out his or her academic, scholarly, or
professional University responsibilities in an intentional and malicious way,” Art. XV § F.A. As a practical
matter, the Board of Trustees perceives no substantive difference between conduct constituting “intentional and
malicious interference with the academic activities of others” and conduct “affecting another person’s ability to
carry out their academic responsibilities in an intentional and malicious way.” For the reasons previously stated,
however, we nonetheless adopt the Hearing Panel’s reasoning and have modified our conclusion accordingly.

1 discussed, a "serious and persistent neglect of faculty duties" constitutes grounds for severe
2 sanctions under Art. XV (dismissal) or Art. XVI (other severe sanctions) of the Faculty
3 Handbook. Art. XV § F.A expressly provides that "faculty responsibilities" are those listed
4 under Art. III §§ C and D. Art. III § D.1.a in turn provides that "[f]aculty members have an
5 obligation to adhere to and behave in keeping with the principles of faculty conduct contained
6 in the Code of Faculty Ethics." Art. III § D.1.a further incorporates the Code of Faculty
7 Ethics by reference to Appendix F of the Faculty Handbook. We construe the phrases
8 "faculty duties" under § F.B(1) and "faculty responsibilities" under § F.A in their ordinary
9 sense as synonyms of "faculty obligations" under Art. III § D.1.a. We therefore reject as
10 meritless the Petitioner's contention that violations of the Code of Faculty Ethics cannot serve
11 as grounds for dismissal or other severe sanctions under the § F.B(1) neglect of faculty duties
12 standard.

13 22. In accordance with the Statement of Charges (Exhibit 17), dismissal for cause
14 or other severe sanction may be warranted under the § F.B(1) neglect of faculty duties
15 standard if the proven facts, or some set of proven facts, establish that the Petitioner seriously
16 and persistently violated one or more of the following provisions of the Code of Faculty
17 Ethics:

18 **Section 1**

19 Western faculty members, guided by a deep conviction of the worth and dignity of their role in
20 the advancement and dissemination of knowledge, recognize the special responsibilities placed
21 upon them as scholars. Their primary responsibility to their respective subjects is to seek and
22 state the truth as they, in consequence of their academic competence, perceive it. To this end
23 faculty energies are devoted to developing and improving their scholarly competence. They
24 accept the obligation to exercise self-discipline and judgment in using, extending and
25 transmitting knowledge. They practice intellectual honesty. When subsidiary interests are
26 followed, they must insure that these interests do not seriously compromise freedom of inquiry
nor the fulfillment of academic responsibilities.

Section 2

As teachers, the Western faculty encourage the free pursuit of learning by students, and
demonstrate by example the best scholarly standards of their respective disciplines. The faculty
respect students as individuals and adhere to their designated role as intellectual guides and
counselors, make every effort to foster honest academic conduct and to assure that evaluations of
students reflect their actual performance. The faculty avoid and condemn sexual harassment,
intimidation, and the exploitation of students. The confidential nature of the relationship between

1 professor and student is respected, and any exploitation of students for private advantage is
2 avoided by the faculty member who acknowledges significant assistance from them. Faculty
3 strive to help students develop high standards of academic competency and respect for academic
4 freedom.

5 **Section 4**

6 As a colleague, the Western faculty member has special obligations that derive from membership
7 in the community of scholars. These include respect for, and defense of, the free inquiry of
8 associates and, in the exchange of criticism and ideas, the respect for the opinions of others.
9 Faculty members acknowledge the contributions of their colleagues and strive to be fair in their
10 professional judgment of colleagues. Each accepts his/her share of faculty responsibilities for the
11 governance of the institution.

12 23. Additional context for these ethical standards is provided in the Preface to the
13 Code of Faculty Ethics. There it is stated that "[m]embership in the academic community and
14 in the faculty of Western Washington University imposes upon faculty a range of obligations
15 beyond that currently accepted by the members of the wider society." Among these are the
16 "obligations to respect the dignity of others; to acknowledge the right of others to express
17 differing opinions; [and] to foster learning." The Code of Faculty Ethics recognizes that "[a]
18 professional faculty, as guardian of academic values, serves as the instrument of disciplinary
19 action against unjustified assaults upon those values by its own members."

20 24. In accordance with the Statement of Charges (Exhibit 17), dismissal for cause
21 or other severe sanction may be warranted under the § F.B(5) "intentional and malicious
22 interference standard" if any set of proven facts establishes that the Petitioner intentionally and
23 maliciously interfered with the scientific, scholarly, and academic activities of others. A
24 violation of the intentional and malicious interference standard need not be predicated upon the
25 violation of any provision of the Code of Faculty Ethics.

26 **D. Constitutional Issues**

27 25. We next address those matters with respect to which the Petitioner raises
28 objections based on his assertion of certain constitutional rights under the First and Fourteenth

1 Amendments. Petitioner does not, and could not, assert a First Amendment privilege to call a
2 female colleague a "cunt," a male colleague a "faggot," or an administrative assistant a "stupid
3 bitch." He does, however, assert First Amendment privileges with respect to his public
4 statements concerning Mark Kuntz's use of student course fees, his in-class statements to
5 [REDACTED] and his out-of-class statements to [REDACTED]. He also contends that the
6 Code of Faculty Ethics is unconstitutionally vague or overbroad for purposes of the First and
7 Fourteenth Amendments. Finally, the Petitioner contends that he cannot be disciplined for
8 misconduct toward Kay Reddell with which he was never charged. We address each of these
9 assertions in turn.

10
11 Student Course Fees

12 26. Student course fees are public funds that are to be used only for the purpose for
13 which they are assessed. We cannot determine on the record before us whether Professor
14 Kuntz properly used cinema course fees to purchase video equipment, nor need we make such
15 a determination. At issue is whether Mills could be disciplined for criticizing Kuntz's
16 expenditures of student course fees, irrespective of the propriety of such expenditures.

17
18 27. The evidence that Mills was angry at Kuntz for "ripping the throat" out of what
19 Mills regarded as "his program" supports a legal conclusion that Mills had a private grievance
20 against Kuntz. Statements concerning matters of personal interest are not protected by the
21 First Amendment. Connick v. Myers, 461 U.S. 138, 147 (1983). We nonetheless conclude
22 that the proper use of student course fees legitimately touches upon a matter of public concern.
23 Under Pickering v. Board of Education, 391 U.S. 563, 568 (1968), we would balance the
24 Petitioner's interests as a citizen in commenting upon matters of public concern and the
25 interests of the University, as employer, in promoting the efficiency of the public services it
26

1 performs through its employees. For our present purposes, however, we will assume, without
2 concluding, that the Petitioner's interests are not outweighed by the University's interests.

3 28. The First Amendment does not protect defamatory statements made with actual
4 malice in the case of public officials, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), or
5 negligently in the case of private persons, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
6 No reasonable person could conclude that Mills was justified in publicly denouncing Professor
7 Kuntz as a thief and an embezzler. Mills made those statements to students, colleagues, and
8 others knowing the statements to be false or with reckless indifference to their truth or falsity.
9 We further conclude that the statements were made "intentionally and maliciously" within the
10 meaning of the Faculty Handbook. Mills expressly intended to injure Kuntz's reputation.
11

12 29. We nevertheless conclude, based on the evidence, that Mills's statements did
13 not in any way "adversely affect" or "interfere" with Kuntz's ability to carry out his academic
14 or professional responsibilities. Professor Mills therefore cannot be disciplined for his
15 statements concerning Professor Kuntz's use of student course fees. Additionally, we conclude
16 that Mills was never charged with having made those statements and that such statements were
17 never considered by the University as a motivating factor in bringing disciplinary action
18 against him.
19

20 [REDACTED]
21
22 30. Professor Mills's in-class statement to [REDACTED] to the effect that she might
23 as well have died of cancer was gratuitous and cruel. The statement served no legitimate
24 pedagogical purpose, was not germane to the subject matter of the course, and was a
25 particularly egregious instance of emotional abuse, intimidation, exploitation, and Professor
26

1 Mills's characteristic inability to exercise appropriate self-discipline and restraint in dealing
2 with students' personal and academic challenges.

3 31. While academic freedom is recognized as a core First Amendment right,
4 Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957), the courts have generally declined to
5 delineate its precise contours, Garcetti v. Ceballos, 126 S.Ct. 1951, 1962 (2006); California
6 Teachers Association v. State Board of Education, 271 F.3d 1141, 1148 (9th Cir. 2001). The
7 courts have likewise refrained from interfering with an educational institution's genuinely
8 academic decisions, University of Michigan v. Ewing, 474 U.S. 214, 225 (1985), or with the
9 lawful exercise of the institution's own essential freedoms to determine what may be taught,
10 how it will be taught, and who will teach it, Sweezy, 354 U.S. at 263.

11
12 32. Western Washington University, through its Faculty Senate and Board of
13 Trustees, has adopted certain standards with respect to how its courses will be taught. Those
14 standards are set forth in the Code of Faculty Ethics. In the spirit of shared governance,
15 particularly with respect to academic matters, that Code recognizes that "[a] professional
16 faculty, as guardian of academic values, serves as the instrument of disciplinary action against
17 unjustified assaults upon those values by its own members." Faculty Handbook, Appendix F.
18 This Board will not lightly disturb the considered academic judgment of a Faculty Hearing
19 Panel that the Petitioner's mistreatment of [REDACTED] constituted an unjustified assault on
20 the institution's core academic values.

21
22 33. While teachers do not shed their constitutional rights at the schoolhouse gate,
23 schools can restrict speech that substantially interferes with schoolwork or discipline. Tinker
24 v. Des Moines Independent Community School District, 393 U.S. 503, 506-08 (1969). And
25 while academic freedom protects classroom speech that is germane to the subject matter,
26

1 Hardy v. Jefferson Community College, 260 F.3d 671, 679 (6th Cir. 2001), classroom speech is
2 not germane if it bears no reasonable relation to the course content and is contrary to a policy
3 regulating speech that the institution has determined to be disruptive of the educational
4 process, even where such speech is ostensibly used for the purpose of motivating students to
5 perform. Bonnell v. Lorenzo, 241 F.3d 800, 820 (6th Cir. 2001); Martin v. Parrish, 805 F.2d
6 583, 585-86 (5th Cir. 1986). Since the classroom is not a public forum, the University can
7 impose reasonable restrictions on classroom speech that relate to legitimate pedagogical
8 concerns such as ensuring that students are not verbally abused and intimidated. Hazelwood
9 School District v. Kuhlmeier, 484 U.S. 260, 267-73 (1988); Piggee v. Carl Sandburg College,
10 __ F.3d __, 2006 WL 2771669 (7th Cir. 2006).

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 34. With respect to the location of the incident involving [REDACTED] the
15 evidence does not establish that a restricted faculty parking lot or the rear entrance to the
16 performing arts center would be considered an open public forum for purposes of First
17 Amendment forum analysis. Nor is there any evidence that the University has designated the
18 campus as a whole as an open or even limited public forum.

19 35. Irrespective of the forum, at least some of Mills's statements directed at
20 [REDACTED] clearly constituted protected political speech, while other statements as clearly did
21 not. Certainly his statements regarding President Bush were privileged. However, his
22 statement about sinking [REDACTED] car in the La Brea Tar Pits was not political speech, but
23 merely a juvenile taunt intended to provok [REDACTED] and to amuse Mills's young friends at
24 [REDACTED] expense.
25 [REDACTED]
26

1 36. Whether political or nonpolitical in nature, we nevertheless disregard all of
2 Mills's statements to or concerning [REDACTED] because they were not the sort of statements that
3 could reasonably be regarded as violating any provision of the Faculty Handbook or Code of
4 Ethics. What does concern us is [REDACTED] credible testimony that she felt she could not
5 respond to Mills for fear of being "pinpointed" in his class the way she had seen other students
6 treated. While the Petitioner should not be disciplined for his statements to [REDACTED] in the
7 parking lot, he can and must be held accountable for his creation of an intimidating classroom
8 environment in which students are reluctant to exercise their own First Amendment rights for
9 fear of retribution.
10

11 Code of Faculty Ethics

12 37. The Petitioner contends that the Code of Faculty Ethics is unconstitutionally
13 vague or overbroad for purposes of the First and Fourteenth Amendments. Generally, a
14 standard of ethical conduct is unconstitutionally vague or overbroad if the standard fails to
15 provide reasonable notice of what conduct is prohibited or if it sweeps in protected speech or
16 expressive conduct. Grayned v. City of Rockford, 408 U.S. 104 (1972).
17

18 38. The Code of Faculty Ethics is the product of the faculty's own self-governance
19 in matters relating to academic freedom and standards of professional conduct. Section 9 of
20 the Code states a presumption that "members of the Western faculty will find this Code of
21 Ethics an adequate guide for the choices they must make in the fulfillment of their academic
22 functions." We concur with the President's conclusion that "[t]he Code of Ethics is
23 sufficiently clear and precise to allow each member of the faculty to know what is required."
24 President's Decision at 3.
25
26

1 39. Due process does not require an academic institution to expressly prohibit every
2 imaginable inappropriate action by its faculty. Ward v. Hickey, 996 F.2d 448, 454 (1st Cir.
3 1993). Nor is perfect clarity required even when a policy regulates protected speech.
4 California Teachers Association, 271 F.3d at 1150. Condemned to the use of words, we can
5 never expect mathematical certainty from our language. Grayned, 408 U.S. at 110.

6 40. Ethical standards requiring faculty members to respect the dignity and opinions
7 of colleagues and to respect students as individuals, while broadly phrased and lacking in
8 mathematical precision, are sufficiently clear to have put the Petitioner on notice that such
9 standards prohibited his nearly unimaginable words directed to Deborah Currier, Gregory
10 Pulver, Kay Reddell, and [REDACTED] It is unreasonable for the Petitioner to expect that the
11 Code of Faculty Ethics should have to spell out that faculty members cannot verbally abuse or
12 intimidate colleagues and students based on personal characteristics such as gender, sexual
13 orientation, or physically debilitating diseases.

14 41. Even a workplace policy that is unconstitutionally vague on its face is not
15 unconstitutionally vague as applied if it is coupled with sufficient notice of what conduct is
16 proscribed. Stastny v. Board of Trustees of Central Washington University, 32 Wn. App. 239,
17 254 (1982), review denied, 98 Wn.2d 1001 (1982), cert. denied, 460 U.S. 1071 (1983). A
18 faculty member has sufficient notice of what conduct is proscribed if, based on existing
19 policies, discussions, and other communications, it is reasonable for the institution to expect
20 the faculty member to know that his conduct was prohibited. Ward, 996 F.2d at 454. A
21 teacher thus has fair notice when he has repeatedly been warned that his behaviors will not be
22 tolerated. Simmons v. Vancouver School District, 41 Wn. App. 365, 372 (1985), review
23 denied, 104 Wn.2d 1018 (1985). Particularly instructive is Sinnot v. Skagit Valley College, 49
24 Wn. App. 878, 886-87 (1987), review denied, 110 Wn.2d 1010 (1988), holding that workplace
25 conduct standards were not unconstitutionally vague as applied where a tenured instructor was
26

1 terminated after repeatedly being warned that the conduct standards prohibited his profanity
2 and derogatory statements about other faculty members.

3 42. The Petitioner's reliance on Cohen v. San Bernardino Valley College, 92 F.3d
4 968 (9th Cir. 1996), is misplaced. In that case, a professor was disciplined without previously
5 being warned that a new sexual harassment policy prohibited classroom statements that the
6 College had tolerated for years. Petitioner Mills was put on notice as early as 1998, when he
7 was denied a promotion, that certain conduct was not appropriate. He was warned again in
8 2000 and 2001 that his inappropriate behaviors must stop. He was specifically told that such
9 behaviors did not conform to the standards of conduct set forth in the Code of Faculty Ethics.
10 These repeated written warnings, together with various other discussions and communications,
11 were more than sufficient to put Petitioner Mills on notice that his behaviors were
12 unacceptable.

13 Kay Reddell

14 43. The Petitioner contends that he cannot be disciplined based on misconduct
15 toward Kay Reddell with which he was never charged. The formal Statement of Charges was
16 excluded from the hearing record on the Petitioner's own motion. The Petitioner therefore
17 cannot be heard to complain if the only statement of charges before us is the Summary
18 Statement of Charges admitted as Exhibit 17 upon the stipulation of the parties.

19 44. The Faculty Handbook requires only that the charges against a faculty member
20 be stated with "reasonable particularity." Art. XVII § 1(3). The Summary Statement of
21 Charges alleges that "Mark Kuntz witnessed Mills verbally abusing students, colleagues *and*
22 *staff* in Spring and Fall 2004." EX 17.3 (emphasis added). Kay Reddell is a staff member.
23 Mark Kuntz did testify about an incident involving Reddell in the spring of 2004. The Board
24 concludes that the charges relating to Kay Reddell were stated with reasonable particularity.

25 45. Additionally, the record shows that the Petitioner had an adequate opportunity
26 to defend himself against the charges of misconduct relating to Kay Reddell. Both Kuntz and

1 Reddell were available for and were in fact subjected to cross-examination. To the extent that
2 there may have been any element of surprise, such surprise was rendered harmless by the
3 Hearing Officer's willingness at any time during the proceedings to continue the hearing as
4 needed to allow the Petitioner an adequate opportunity to defend himself.

5 **E. Neglect of Faculty Duties Standard**

6 46. We conclude that our factual findings, considered as a whole, establish serious
7 and persistent neglect of faculty duties with reference to the § F.B(1) "neglect of faculty
8 duties" standard and Sections 1, 2, and 4 of the Code of Faculty Ethics. We base this
9 conclusion on our findings that faculty, staff, and students have been subjected over a period of
10 years to the Petitioner's verbal abuse, sexual innuendo, harassment, intimidation, exploitation,
11 and lack of self-discipline, restraint, and professional judgment.

12 47. Section 1 of the Code of Faculty Ethics requires faculty members to recognize
13 the special responsibilities placed upon them as scholars. Their primary responsibility for their
14 respective subjects is to seek and state the truth as they, *in consequence of their academic*
15 *competence*, perceive it. They accept the obligation to exercise *self-discipline and judgment* in
16 using and transmitting knowledge. The Petitioner's statement to [REDACTED] about dying
17 from cancer was not made in consequence of the Petitioner's academic competence and
18 demonstrated an utter lack of self-discipline and judgment in the transmission of knowledge.
19 The same must be concluded with respect to the Petitioner's constant haranguing and
20 ridiculing of his students as privileged, lazy, and stupid; his classroom use of profanities and
21 sexual innuendo; his demeaning and degrading comments based on characteristics like gender
22 or sexual orientation; his use of class time to espouse his views regarding Christianity and the
23 Catholic Church in particular; and his disparaging of fellow faculty members. None of this has
24 anything to do with the subject matter of the Petitioner's courses, none of it is offered in
25 consequence of the Petitioner's academic competence, and none of it exhibits self-discipline or
26 judgment in the transmission of knowledge.

1 48. Section 2 of the Code of Faculty Ethics requires faculty members to encourage
2 the free pursuit of learning by students. The faculty respect students as individuals. Faculty
3 avoid and condemn sexual harassment, intimidation, and the exploitation of students. The free
4 pursuit of learning by students is not encouraged by creating a hostile and intimidating
5 classroom environment in which students refrain from participating in class discussions or
6 speaking their minds in or out of class for fear of being singled out and ridiculed by their
7 teacher. Respect for students is not demonstrated by calling them "stupid," "privileged white
8 kids," "shit for brains," "blondies," "400-pound canary," or "retarded." These and other
9 behaviors show a serious lack of commitment to avoiding sexual harassment, intimidation, and
10 exploitation of students.

11 49. Section 4 of the Code of Faculty Ethics recognizes that faculty members have
12 special obligations as colleagues that derive from their membership in the community of
13 scholars. At a minimum, faculty members must treat each other with respect and must strive to
14 be fair in their professional judgment of colleagues. The respectful treatment of colleagues is
15 not demonstrated by making sexually degrading remarks to and concerning other faculty
16 members; disrupting faculty meetings with abusive and slanderous rants; shouting obscenities
17 at the departmental secretary; or making derogatory comments about departmental colleagues
18 to students. Far from striving to be fair in his professional judgment of colleagues, the
19 Petitioner has time and again demonstrated a complete failure to exercise any judgment at all.

20 50. The Petitioner's neglect of his faculty obligations is serious. No written code of
21 ethics is required to put a reasonable faculty member on notice that calling a female colleague
22 a "slut" and a "cunt;" a male colleague a "faggot;" an administrative secretary a "stupid bitch"
23 and "white trailer trash;" and a student assistant a "bitch" constitutes a serious breach of
24 professional ethics. Such misconduct cannot be tolerated in any workplace because of its
25 destructive impact on employee morale and productivity, not to mention its potential for
26 subjecting the employer to sexual harassment claims. Equally serious, and for much the same

1 reasons, are racially charged references to students and staff as "white trash" and "privileged
2 white kids," as well as statements exhibiting a callous insensitivity to mental and physical
3 disabilities. See Finding of Fact 37 (██████████ if you can't even put up your piece for class then
4 you should have just died of cancer"); Finding of Fact 52 ("I would understand if [the student]
5 were missing a leg," "Is she retarded?"). Effective remedial action is required to protect the
6 University and its faculty, staff, and students from the Petitioner's unrestrained indifference to
7 fundamental civil rights.

8 51. The Petitioner's neglect of his faculty obligations is persistent. His
9 mistreatment of faculty, staff, and students has continued unabated for well over five years
10 despite multiple warnings that his behaviors do not conform to acceptable workplace
11 standards. We are not swayed by the Petitioner's argument that persistence cannot be proved
12 based on the mere fact that he has sometimes refrained from further instances of specific
13 misconduct after being confronted about it by the individuals targeted by his abuse. The
14 evidence is overwhelming that the Petitioner has persistently engaged in a pattern and practice
15 of verbal abuse and intimidation directed at students, faculty, and staff. While such abuse and
16 intimidation may take various forms and be directed at various individuals in a variety of
17 settings, the pattern and practice of abuse and intimidation is regrettably consistent,
18 unchanging, and continuing.

19 52. The Petitioner's neglect of faculty duties adversely affected in a substantial way
20 the ability of others to carry out their academic, scholarly, or professional responsibilities.
21 Faculty colleagues have gone out of their way to avoid chance encounters with him. They stop
22 talking and refrain from interacting with him at faculty meetings because of his insulting and
23 aggressive manner. The Petitioner's treatment of colleagues has caused them to feel degraded,
24 intimidated, angry, embarrassed, fearful, and upset. Faculty members have often had to
25 intercede on behalf of students who were upset by the Petitioner's mistreatment of them. As
26

1 Mark Kuntz testified, the department was constantly in a "repair mode" trying to solve "the
2 Perry issue."

3 53. Students in the Petitioner's classes felt belittled, degraded, and intimidated by
4 his treatment of them. They were reluctant to speak up in class or to discuss their concerns
5 with the Petitioner for fear of being ridiculed or cursed. [REDACTED] as just one
6 example, was afraid of being "pinpointed" in class if she said anything in response to the
7 Petitioner's taunts regarding her political views. A number of students requested waivers from
8 the Petitioner's courses or withdrew from his courses after enrolling because of his abusive and
9 intimidating behaviors. Perhaps the most egregious instance of substantially affecting a
10 student's academic endeavors was the Petitioner's treatment of [REDACTED]. His cruelty
11 toward her served no legitimate pedagogical purpose and was not necessary to motivate her to
12 present her work.

13 54. Additionally, we conclude that Petitioner Mills has persistently ignored
14 warnings regarding University policies prohibiting the possession of weapons on campus. His
15 own testimony establishes that the knife he displayed in front of [REDACTED] had a four-
16 inch blade. Police Chief Shaw testified that possessing such a knife on campus would violate
17 University policy. We conclude based on this evidence that the Petitioner did violate the
18 policy despite repeated warnings. Further, we conclude that his classroom display of the knife
19 was intimidating to at least one student and substantially interfered with her academic pursuits
20 to that extent that it caused her to feel apprehensive and unsafe. We concur with the
21 Petitioner's departmental colleagues (see Exhibits 5 and 7) in failing to see how his carrying of
22 weapons on campus better serves the interests of students, faculty, and staff.

23 55. A severe sanction short of dismissal is plainly warranted based on the foregoing
24 conclusions relating to the Petitioner's serious and persistent neglect of faculty duties and the
25 substantial impact that his behaviors have had on the ability of faculty, staff, and students to
26 carry out their academic and professional rights and responsibilities. We nevertheless reserved

1 a final decision regarding the imposition of sanctions pending further review by the Faculty
2 Hearing Panel as to whether or not the Petitioner should be dismissed for cause. See Order on
3 Remand at 40.

4 56. Dismissal for cause is warranted under § F.B(1) if the Petitioner's neglect of
5 faculty duties adversely affected, in an intentional and malicious way, the ability of others to
6 carry out their academic, scholarly, or professional responsibilities. We have adopted the
7 Hearing Panel's findings that the Petitioner knowingly and intentionally engages in the
8 behaviors at issue and that he intends both the good and bad consequence of such behaviors.
9 See Finding of Fact 69. These findings comport with our definition of "intentional" as set
10 forth in Conclusion of Law 16 above. It follows from our foregoing conclusions that the
11 Petitioner's behaviors have adversely affected in an intentional way the ability of others to
12 carry out their academic and professional responsibilities.

13 57. With respect to malice, we have likewise adopted the Hearing Panel's finding
14 that "on occasion [the Petitioner] may not have formed a prior specific malice for the particular
15 person to whom he is then uttering his words." See Finding of Fact 72. This mixed finding of
16 fact and conclusion of law would suggest that while on some occasions the Petitioner did not
17 act maliciously, on other occasions he did. Additionally we have noted (without expressly
18 adopting) the Hearing Panel's conclusion that "[e]ven were the Panel not to find [the
19 Petitioner's] conduct malicious, at best the Panel could only find that his verbal acts were taken
20 with an ongoing, deliberate and reckless indifference to the impact his actions have on those
21 students and other persons who do not or cannot rise to his challenge." Panel Decision at 9.
22 On remand, we asked the Hearing Panel to reconsider this conclusion in light of our definition
23 of a "malicious" act as one that is substantially certain to cause injury and that is done without
24 just cause or excuse or in reckless disregard of the law or of a person's rights. See Conclusion
25 of Law 16 above.

1 58. The Board has not adopted the Panel's findings regarding the Petitioner's future
2 ability to adhere to the Code of Faculty Ethics based solely on his demeanor at the hearing.
3 We agree that such demeanor evidence may appropriately be considered in mitigation of a
4 more severe sanction. However, the Petitioner's demeanor has no legal bearing on whether he
5 did or did not act maliciously in the past. Moreover, while this Board must and should give
6 "due regard" to the Hearing Panel's opportunity to observe witnesses, RCW 34.05.464(4), we
7 are not bound by the Panel's findings based on credibility or demeanor evidence. Tapper v.
8 Employment Security Department, 122 Wn.2d 397, 405-06 (1993); Regan v. State Department
9 of Licensing, 130 Wn. App. 39, 59-60 (2005). We are particularly reluctant to be persuaded by
10 such evidence in this case given our factual findings relating to notice (Findings of Fact 62-66)
11 and the Petitioner's state of mind (Findings of Fact 67-72).

12 59. In accordance with Art. XVII § 4.b(3) of the Faculty Handbook, the Board
13 determined to remand this matter to the Faculty Hearing Panel for further proceedings
14 consistent with our Review Decision and Order on Remand. We based this determination on
15 our findings that (1) the procedures followed by the Hearing Panel in reaching its decision
16 were not in accordance with the Faculty Handbook's standards for the imposition of severe
17 sanctions (see Conclusion of Law 57), and that (2) our review of the record revealed the
18 importance of evidence which the Panel did not adequately consider (see Conclusion of Law
19 58).

20 60. On remand, the Hearing Panel determined that the impact of the Petitioner's
21 behavior did not adversely affect the ability of any other persons to carry out their academic,
22 scholarly, or professional responsibilities in a way that was both intentional and malicious.
23 Decision on Remand at 4-8. Although it seems apparent that reasonable minds may differ on
24 this point, we refrain in this instance from substituting our judgment for that of the Hearing
25 Panel. Because we have remanded this question to the Panel, we are prepared to accept the
26 reconsidered judgment of the Petitioner's faculty peers that he should not be dismissed for

1 cause. However, while concurring in the result, we decline to adopt the Hearing Panel's
2 conclusion that it cannot be shown on this record that the Petitioner's behaviors adversely
3 affected, in an intentional and malicious way, the ability of others to carry out their academic,
4 scholarly, or professional activities.

5 **F. Intentional and Malicious Interference Standard**

6 61. Dismissal for cause is warranted under § F.B(5) if, without regard to the Code
7 of Faculty Ethics, any of the proven facts establish that the Petitioner intentionally and
8 maliciously interfered with the academic or scholarly activities of others. For the reasons
9 discussed immediately above (see Conclusions of Law 57-59), we deferred deciding, pending
10 further review by the Hearing Panel, whether the facts establish one or more violations of the
11 intentional and malicious interference standard under § F.B(5).

12 62. On remand, the Hearing Panel did not directly consider whether the Petitioner
13 intentionally and maliciously interfered with the academic or scholarly activities of others.
14 However, the Panel concluded that the impact of the Petitioner's behaviors did not affect the
15 ability of any other persons to carry out their academic, scholarly, or professional
16 responsibilities in a way that was both intentional and malicious. Because we accept the
17 Panel's recommendation that the Petitioner should not be dismissed for cause, and because
18 sufficient grounds exist under the "neglect of faculty duties" standard to impose a severe
19 sanction other than dismissal, we find it unnecessary at this time to give further consideration
20 to the "intentional and malicious interference" standard under § F.B(5).

21 **G. Procedural Issues**

22 63. Our previous order remanding this matter for further proceedings required that
23 we address the Petitioner's continuing status pending our issuance of a final order. The
24 Petitioner's suspension with pay in October 2004, prior to the specification of charges, was not
25 a disciplinary suspension covered by the Faculty Handbook and was within the Provost's
26 authority to order in circumstances warranting caution out of justifiable concern for the safety

1 of students and others. The Provost's provision of a prompt post-suspension hearing sufficed
2 to satisfy the requirements of procedural due process.

3 64. Once charges were specified, however, the Petitioner, in accordance with the
4 Faculty Handbook, could remain suspended with pay (or assigned to other duties in lieu of
5 suspension) only if immediate harm to the Petitioner or others was threatened by his
6 continuance. Art. XVII § 2.a. The Faculty Handbook also requires the Provost within ten days
7 of specifying charges to consult with the Executive Council of the Faculty Senate concerning
8 the propriety, length, and other conditions of any suspension pending an ultimate determination
9 of the faculty member's status through the institution's hearing procedures. Id.

10 65. The Provost did consult with the faculty leadership regarding the initial
11 suspension (see RP II 72), which he was not required to do. However, the record is silent as to
12 whether or not the required consultation took place with the Executive Council concerning any
13 suspension from the time when the charges were specified. Although the matter of the
14 Petitioner's interim suspension is not the matter before us for decision, we have directed the
15 President, pending a final administrative decision in this matter, to make the appropriate
16 inquiries to determine that the University's procedures have been followed and that the
17 Petitioner remains suspended with pay, or assigned to other duties in lieu of suspension, only if
18 immediate harm to others would be threatened by his continuance.

19 66. The Petitioner raises the additional issue of whether the proceedings herein
20 should have been conducted in open session. Initially we note that the Open Public Meetings
21 Act, chapter 42.43 RCW, does not apply when the Board of Trustees meets in its quasi-judicial
22 capacity to conduct an adjudicative proceeding governed by the APA. RCW 42.43.140 (2),
23 (3). The APA itself provides that an adjudicative proceeding "is open to public observation,
24 except for the parts that the presiding officer states to be closed under a provision of law
25 expressly authorizing closure or under a protective order entered by the presiding officer
26 pursuant to applicable rules." RCW 34.05.449(5).

67. The Faculty Handbook, Art. XVII § 2.d, expressly provides that the hearing will be private, unless the Hearing Panel, in consultation with the Provost and only with the agreement of the faculty member, decides that the hearing should be public. The Handbook further provides that review by the Board of Trustees is to be conducted in executive session. Art. XVII § 4.a. We regard the Faculty Handbook's hearing procedures, as we must, as a "provision of law expressly authorizing closure" of the proceedings for purposes of RCW 34.05.449(5).

68. An independent provision of law authorizing closure or an appropriate protective order is the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, which prohibits the unauthorized disclosure of student education records. The record herein is replete with protected education records, including numerous exhibits and extensive portions of the transcript of the proceedings. Some of these student records also contain confidential health information protected by chapter 70.02 RCW. It would have been proper for the Hearing Officer to have closed the hearing for these purposes and also to have entered a protective order prohibiting the unauthorized disclosure of confidential student information. Accordingly, the Board of Trustees has entered an appropriate protective order governing the proceedings herein.

III. FINAL ORDER

The Board of Trustees hereby AFFIRMS the recommendation of the Faculty Hearing Panel that the Petitioner be subjected to a severe sanction other than dismissal based on his serious and persistent neglect of faculty duties that adversely affected in a substantial way the ability of others to carry out their academic and professional rights and responsibilities.

1. As recommended by the Hearing Panel, the Petitioner shall be suspended without pay from all faculty privileges and duties, including teaching, for two academic quarters during the regular 2006-07 academic year. Unless stayed, the suspension shall be served during Winter and Spring Quarters.

1 2. To the extent permitted by law, the Petitioner's medical insurance benefits shall
2 be continued during the period of suspension without pay. Under rules promulgated by the
3 Washington State Health Care Authority, only employees in pay status eight or more hours per
4 month are eligible to receive the employer contribution for health insurance benefits. WAC
5 182-12-133. However, an employee on authorized leave without pay may continue insurance
6 coverage by self-paying premiums at the group rate. WAC 182-12-133(1)(f). The Petitioner's
7 suspension without pay shall be deemed an authorized leave for purposes of WAC 182-12-
8 133(1)(f).

9 3. The Board respectfully declines to adopt the Hearing Panel's recommendation
10 that the Petitioner be required to sign a statement agreeing to comply with the Code of Faculty
11 Ethics as a condition of resuming his teaching duties. All faculty members are expected to
12 comply with the Code of Faculty Ethics. We trust that the Petitioner will be held accountable
13 for any future violations of the faculty's ethical standards, whether or not he agrees to comply
14 with such standards.

15 4. The Board likewise declines to adopt the Hearing Panel's recommendation that
16 the Petitioner be required to conduct regular course evaluations as a condition of his continuing
17 employment in the future. Whether course evaluations should be required, in which courses,
18 and for what period of time, are all matters best committed to the judgment and sound
19 discretion of the University's academic administrators in accordance with the evaluation
20 procedures for tenured faculty set forth in the Faculty Handbook.

21 5. The President's Decision directed Dean Carol Edwards to take certain
22 "affirmative steps" to ensure the Petitioner's compliance with his faculty obligations, including
23 mandatory sexual harassment training to be completed during the period of suspension
24 recommended by the Hearing Panel. The President's independent directive to the Dean
25 requires no action on the part of the Board of Trustees. The Board nonetheless concurs that
26 some such training is plainly warranted on this record. In accordance with Fair Labor

1 Standards Act (FLSA) regulations, however, the Petitioner should be paid a full week's salary
2 for any week in which the required training occurs. See 5 C.F.R. § 551.423(a). The Board
3 leaves it to the administration to determine when such training should take place, whether
4 before, during, or immediately after the period of suspension without pay. If the required
5 training should take place during the period of the disciplinary suspension, the Board
6 authorizes the administration to modify the implementation of our order as necessary to
7 comply with FLSA regulations applicable to exempt employees.

8 6. The Board of Trustees hereby enters a protective order governing these
9 proceedings which shall be binding on the parties and their counsel of record and which
10 expressly prohibits the disclosure of confidential student information except as necessary for
11 purposes directly relating to these proceedings. Any further proceedings herein shall be closed
12 to public observation to the extent required to comply with this order and applicable laws.

13 7. This is a "final order" in an adjudicative proceeding under the Administrative
14 Procedure Act, chapter 34.05 RCW. As there provided, the Petitioner within ten days of
15 service of the final order may file with the Board of Trustees a petition for reconsideration,
16 stating the specific grounds upon which relief is requested. RCW 34.05.470(1). The filing of a
17 petition for reconsideration is not a prerequisite for seeking judicial review. RCW
18 34.05.470(5). A petition for judicial review must be filed and served within thirty days after
19 service of the final order. RCW 34.05.542(2). The petition must be filed and served in the
20 manner provided under RCW 34.05.514(2) and RCW 34.05.542(2), (4), and (6).

21 ENTERED at Bellingham, Washington, this 27th day of October, 2006.
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Kevin Raymond

KEVIN RAYMOND
Chair, Board of Trustees
Western Washington University

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Petitioner:
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Carney Badley Spellman, P.S.
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ATTACHMENT B

1940 Statement of Principles on Academic Freedom and Tenure

with 1970 Interpretive Comments

In 1940, following a series of joint conferences begun in 1934, representatives of the American Association of University Professors and of the Association of American Colleges (now the Association of American Colleges and Universities) agreed upon a restatement of principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure. This restatement is known to the profession as the 1940 Statement of Principles on Academic Freedom and Tenure.

The 1940 Statement is printed below, followed by Interpretive Comments as developed by representatives of the American Association of University Professors and the Association of American Colleges in 1969. The governing bodies of the two associations, meeting respectively in November 1989 and January 1990, adopted several changes in language in order to remove gender-specific references from the original text.

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole.¹ The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.^[1]²

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

Academic Freedom

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.^[2] Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.^[3]
3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they

1. The word "teacher" as used in this document is understood to include the investigator who is attached to an academic institution without teaching duties.

2. Boldface numbers in brackets refer to Interpretive Comments that follow.

should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.[4]

Academic Tenure

After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

1. The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.
2. Beginning with appointment to the rank of full-time instructor or a higher rank,[5] the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution, it may be agreed in writing that the new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years.[6] Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.[7]
3. During the probationary period a teacher should have the academic freedom that all other members of the faculty have.[8]
4. Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges and should have the opportunity to be heard in his or her own defense by all bodies that pass judgment upon the case. The teacher should be permitted to be accompanied by an advisor of his or her own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from the teacher's own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.[9]
5. Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

1940 Interpretations

At the conference of representatives of the American Association of University Professors and of the Association of American Colleges on November 7-8, 1940, the following interpretations of the 1940 *Statement of Principles on Academic Freedom and Tenure* were agreed upon:

1. That its operation should not be retroactive.
2. That all tenure claims of teachers appointed prior to the endorsement should be determined in accordance with the principles set forth in the 1925 *Conference Statement on Academic Freedom and Tenure*.
3. If the administration of a college or university feels that a teacher has not observed the admonitions of paragraph 3 of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position, it may proceed to file charges under paragraph 4 of the section on Academic Tenure. In pressing such charges, the administration should remember that

teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility, and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

1970 Interpretive Comments

Following extensive discussions on the 1940 Statement of Principles on Academic Freedom and Tenure with leading educational associations and with individual faculty members and administrators, a joint committee of the AAUP and the Association of American Colleges met during 1969 to reevaluate this key policy statement. On the basis of the comments received, and the discussions that ensued, the joint committee felt the preferable approach was to formulate interpretations of the Statement in terms of the experience gained in implementing and applying the Statement for over thirty years and of adapting it to current needs.

The committee submitted to the two associations for their consideration the following "Interpretive Comments." These interpretations were adopted by the Council of the American Association of University Professors in April 1970 and endorsed by the Fifty-sixth Annual Meeting as Association policy.

In the thirty years since their promulgation, the principles of the 1940 *Statement of Principles on Academic Freedom and Tenure* have undergone a substantial amount of refinement. This has evolved through a variety of processes, including customary acceptance, understandings mutually arrived at between institutions and professors or their representatives, investigations and reports by the American Association of University Professors, and formulations of statements by that association either alone or in conjunction with the Association of American Colleges. These comments represent the attempt of the two associations, as the original sponsors of the 1940 *Statement*, to formulate the most important of these refinements. Their incorporation here as Interpretive Comments is based upon the premise that the 1940 *Statement* is not a static code but a fundamental document designed to set a framework of norms to guide adaptations to changing times and circumstances.

Also, there have been relevant developments in the law itself reflecting a growing insistence by the courts on due process within the academic community which parallels the essential concepts of the 1940 *Statement*; particularly relevant is the identification by the Supreme Court of academic freedom as a right protected by the First Amendment. As the Supreme Court said in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

The numbers refer to the designated portion of the 1940 *Statement* on which interpretive comment is made.

1. The Association of American Colleges and the American Association of University Professors have long recognized that membership in the academic profession carries with it special responsibilities. Both associations either separately or jointly have consistently affirmed these responsibilities in major policy statements, providing guidance to professors in their utterances as citizens, in the exercise of their responsibilities to the institution and to students, and in their conduct when resigning from their institution or when undertaking government-sponsored research. Of particular relevance is the *Statement on Professional Ethics*, adopted in 1966 as Association policy. (A revision, adopted in 1987, may be found in AAUP, *Policy Documents and Reports*, 10th ed. [Washington, D.C., 2006], 171-72.)
2. The intent of this statement is not to discourage what is "controversial." Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject.
3. Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 *Statement*, and we do not now endorse such a departure.

4. This paragraph is the subject of an interpretation adopted by the sponsors of the 1940 *Statement* immediately following its endorsement which reads as follows:

If the administration of a college or university feels that a teacher has not observed the admonitions of paragraph 3 of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position, it may proceed to file charges under paragraph 4 of the section on Academic Tenure. In pressing such charges, the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility, and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

Paragraph 3 of the section on Academic Freedom in the 1940 *Statement* should also be interpreted in keeping with the 1964 *Committee A Statement on Extramural Utterances*, which states inter alia: "The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position. Extramural utterances rarely bear upon the faculty member's fitness for the position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar."

Paragraph 5 of the *Statement on Professional Ethics* also deals with the nature of the "special obligations" of the teacher. The paragraph reads as follows:

As members of their community, professors have the rights and obligations of other citizens. Professors measure the urgency of these obligations in the light of their responsibilities to their subject, to their students, to their profession, and to their institution. When they speak or act as private persons, they avoid creating the impression of speaking or acting for their college or university. As citizens engaged in a profession that depends upon freedom for its health and integrity, professors have a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.

Both the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time probationary and the tenured teacher, but also to all others, such as part-time faculty and teaching assistants, who exercise teaching responsibilities.

5. The concept of "rank of full-time instructor or a higher rank" is intended to include any person who teaches a full-time load regardless of the teacher's specific title.³
6. In calling for an agreement "in writing" on the amount of credit given for a faculty member's prior service at other institutions, the *Statement* furthers the general policy of full understanding by the professor of the terms and conditions of the appointment. It does not necessarily follow that a professor's tenure rights have been violated because of the absence of a written agreement on this matter. Nonetheless, especially because of the variation in permissible institutional practices, a written understanding concerning these matters at the time of appointment is particularly appropriate and advantageous to both the individual and the institution.⁴
7. The effect of this subparagraph is that a decision on tenure, favorable or unfavorable, must be made at least twelve months prior to the completion of the probationary period. If the decision is negative, the appointment for the following year becomes a terminal one. If the decision is affirmative, the provisions in the 1940 *Statement* with respect to the termination of service of teachers or investigators after the expiration of a probationary period should apply from the date when the favorable decision is made.

3. For a discussion of this question, see the "Report of the Special Committee on Academic Personnel Ineligible for Tenure," *Policy Documents and Reports*, 9th ed. (Washington, D.C., 2001), 88-91.

4. For a more detailed statement on this question, see "On Crediting Prior Service Elsewhere as Part of the Probationary Period," *Policy Documents and Reports*, 10th ed. (Washington, D.C., 2006), 55-56.

The general principle of notice contained in this paragraph is developed with greater specificity in the *Standards for Notice of Nonreappointment*, endorsed by the Fiftieth Annual Meeting of the American Association of University Professors (1964). These standards are:

Notice of nonreappointment, or of intention not to recommend reappointment to the governing board, should be given in writing in accordance with the following standards:

1. *Not later than March 1 of the first academic year of service*, if the appointment expires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.
2. *Not later than December 15 of the second academic year of service*, if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.
3. At least twelve months before the expiration of an appointment after two or more years in the institution.

Other obligations, both of institutions and of individuals, are described in the *Statement on Recruitment and Resignation of Faculty Members*, as endorsed by the Association of American Colleges and the American Association of University Professors in 1961.

8. The freedom of probationary teachers is enhanced by the establishment of a regular procedure for the periodic evaluation and assessment of the teacher's academic performance during probationary status. Provision should be made for regularized procedures for the consideration of complaints by probationary teachers that their academic freedom has been violated. One suggested procedure to serve these purposes is contained in the *Recommended Institutional Regulations on Academic Freedom and Tenure*, prepared by the American Association of University Professors.
9. A further specification of the academic due process to which the teacher is entitled under this paragraph is contained in the *Statement on Procedural Standards in Faculty Dismissal Proceedings*, jointly approved by the American Association of University Professors and the Association of American Colleges in 1958. This interpretive document deals with the issue of suspension, about which the 1940 *Statement* is silent.

The 1958 *Statement* provides: "Suspension of the faculty member during the proceedings is justified only if immediate harm to the faculty member or others is threatened by the faculty member's continuance. Unless legal considerations forbid, any such suspension should be with pay." A suspension which is not followed by either reinstatement or the opportunity for a hearing is in effect a summary dismissal in violation of academic due process.

The concept of "moral turpitude" identifies the exceptional case in which the professor may be denied a year's teaching or pay in whole or in part. The statement applies to that kind of behavior which goes beyond simply warranting discharge and is so utterly blameworthy as to make it inappropriate to require the offering of a year's teaching or pay. The standard is not that the moral sensibilities of persons in the particular community have been affronted. The standard is behavior that would evoke condemnation by the academic community generally.

Endorsers

Association of American Colleges and Universities	1941
American Association of University Professors	1941
American Library Association (adapted for librarians)	1946
Association of American Law Schools	1946
American Political Science Association	1947
American Association of Colleges for Teacher Education	1950
American Association for Higher Education	1950
Eastern Psychological Association	1950
Southern Society for Philosophy and Psychology	1953

American Psychological Association	1961
American Historical Association	1961
Modern Language Association of America	1962
American Economic Association	1962
American Agricultural Economics Association	1962
Midwest Sociological Society	1963
Organization of American Historians	1963
American Philological Association	1963
American Council of Learned Societies	1963
Speech Communication Association	1963
American Sociological Association	1963
Southern Historical Association	1963
American Studies Association	1963
Association of American Geographers	1963
Southern Economic Association	1963
Classical Association of the Middle West and South	1964
Southwestern Social Science Association	1964
Archaeological Institute of America	1964
Southern Management Association	1964
American Theatre Association	1964
South Central Modern Language Association	1964
Southwestern Philosophical Society	1964
Council of Independent Colleges	1965
Mathematical Association of America	1965
Arizona-Nevada Academy of Science	1965
American Risk and Insurance Association	1965
Academy of Management	1965
American Catholic Historical Association	1966
American Catholic Philosophical Association	1966
Association for Education in Journalism and Mass Communication	1966
Western History Association	1966
Mountain-Plains Philosophical Conference	1966
Society of American Archivists	1966
Southeastern Psychological Association	1966
Southern Speech Communication Association	1966
American Association for the Advancement of Slavic Studies	1967
American Mathematical Society	1967
College Theology Society	1967
Council on Social Work Education	1967
American Association of Colleges of Pharmacy	1967
American Academy of Religion	1967
Association for the Sociology of Religion	1967
American Society of Journalism School Administrators	1967
John Dewey Society	1967
South Atlantic Modern Language Association	1967
American Finance Association	1967
Association for Social Economics	1967
Phi Beta Kappa Society	1968
American Society of Christian Ethics	1968
American Association of Teachers of French	1968
Eastern Finance Association	1968
American Association for Chinese Studies	1968
American Society of Plant Physiologists	1968
University Film and Video Association	1968
American Dialect Society	1968

American Speech-Language-Hearing Association	1968
Association of Social and Behavioral Scientists	1968
College English Association	1968
National College Physical Education Association for Men	1969
American Real Estate and Urban Economics Association	1969
History of Education Society	1969
Council for Philosophical Studies	1969
American Musicological Society	1969
American Association of Teachers of Spanish and Portuguese	1969
Texas Community College Teachers Association	1970
College Art Association of America	1970
Society of Professors of Education	1970
American Anthropological Association	1970
Association of Theological Schools	1970
Association of Schools of Journalism and Mass Communication	1971
American Business Law Association	1971
American Council for the Arts	1972
New York State Mathematics Association of Two-Year Colleges	1972
College Language Association	1973
Pennsylvania Historical Association	1973
Massachusetts Regional Community College Faculty Association	1973
American Philosophical Association ⁵	1974
American Classical League	1974
American Comparative Literature Association	1974
Rocky Mountain Modern Language Association	1974
Society of Architectural Historians	1975
American Statistical Association	1975
American Folklore Society	1975
Association for Asian Studies	1975
Linguistic Society of America	1975
African Studies Association	1975
American Institute of Biological Sciences	1975
North American Conference on British Studies	1975
Sixteenth-Century Studies Conference	1975
Texas Association of College Teachers	1976
Society for Spanish and Portuguese Historical Studies	1976
Association for Jewish Studies	1976
Western Speech Communication Association	1976
Texas Association of Colleges for Teacher Education	1977
Metaphysical Society of America	1977
American Chemical Society	1977
Texas Library Association	1977
American Society for Legal History	1977
Iowa Higher Education Association	1977
American Physical Therapy Association	1979
North Central Sociological Association	1980
Dante Society of America	1980
National Communication Association	1981
American Association of Physics Teachers	1982
Middle East Studies Association	1982

5. Endorsed by the association's Western Division in 1952, Eastern Division in 1953, and Pacific Division in 1962.

National Education Association	1985
American Institute of Chemists	1985
American Association of Teachers of German	1985
American Association of Teachers of Italian	1985
American Association for Applied Linguistics	1986
American Association of Teachers of Slavic and East European Languages	1986
American Association for Cancer Education	1986
American Society of Church History	1986
Oral History Association	1987
Society for French Historical Studies	1987
History of Science Society	1987
American Association of Pharmaceutical Scientists	1988
American Association for Clinical Chemistry	1988
Council for Chemical Research	1988
Association for the Study of Higher Education	1988
Association for Psychological Science	1989
University and College Labor Education Association	1989
Society for Neuroscience	1989
Renaissance Society of America	1989
Society of Biblical Literature	1989
National Science Teachers Association	1989
Medieval Academy of America	1990
American Society of Agronomy	1990
Crop Science Society of America	1990
Soil Science Society of America	1990
International Society of Prostitologists	1990
Society for Ethnomusicology	1990
American Association of Physicists in Medicine	1990
Animal Behavior Society	1990
Illinois Community College Faculty Association	1990
American Society for Theatre Research	1990
National Council of Teachers of English	1991
Latin American Studies Association	1992
Society for Cinema and Media Studies	1992
American Society for Eighteenth-Century Studies	1992
Council of Colleges of Arts and Sciences	1992
American Society for Aesthetics	1992
Association for the Advancement of Baltic Studies	1994
American Council of Teachers of Russian	1994
Council of Teachers of Southeast Asian Languages	1994
American Association of Teachers of Arabic	1994
Association of Teachers of Japanese	1994
Academic Senate for California Community Colleges	1996
Council of Graduate Programs in Communication Sciences and Disorders	1996
Association for Women in Mathematics	1997
National Council for the Social Studies	1997
Philosophy of Time Society	1998
World Communication Association	1999
The Historical Society	1999
Association for Theatre in Higher Education	1999
National Association for Ethnic Studies	1999
Association of Ancient Historians	1999
American Culture Association	1999
American Conference for Irish Studies	1999
Society for Philosophy in the Contemporary World	1999
Eastern Communication Association	1999

Association for Canadian Studies in the United States	1999
American Association for the History of Medicine	2000
Missouri Association of Faculty Senates	2000
Association for Symbolic Logic	2000
American Society of Criminology	2001
New England Historical Association	2001
American Jewish Historical Society	2001
Group for the Use of Psychology in History	2001
Society for the Scientific Study of Religion	2001
Society for German-American Studies	2001
Society for Historians of the Gilded Age and Progressive Era	2001
Eastern Sociological Society	2001
Chinese Historians in the United States	2001
Community College Humanities Association	2002
Immigration and Ethnic History Society	2002
Agricultural History Society	2004
National Council for Accreditation of Teacher Education	2005
American Council on the Teaching of Foreign Languages	2005
Society for the Study of Social Biology	2005
Association of Black Sociologists	2005
Society for the Study of Social Problems	2005
Dictionary Society of North America	2005
Society for Buddhist-Christian Studies	2005
National Women's Studies Association	2006
National Coalition for History	2006
Society for Armenian Studies	2006
Society for the Advancement of Scandinavian Study	2006
American Physiological Society	2006
College Forum of the National Council of Teachers of English	2006
Society for Military History	2006
Society for Industrial and Applied Mathematics	2006
Association for Research on Ethnicity and Nationalism in the Americas	2006
Society of Dance History Scholars	2006
Association of Literary Scholars and Critics	2006
Society for Applied Anthropology	2006
Society for Music Theory	2006
Society for Historians of American Foreign Relations	2006
American Society of Plant Taxonomists	2006
Law and Society Association	2006

ATTACHMENT C

Statement on Professional Ethics

The statement that follows, a revision of a statement originally adopted in 1966, was approved by the Association's Committee on Professional Ethics, adopted by the Association's Council in June 1987, and endorsed by the Seventy-third Annual Meeting.

Introduction

From its inception, the American Association of University Professors has recognized that membership in the academic profession carries with it special responsibilities. The Association has consistently affirmed these responsibilities in major policy statements, providing guidance to professors in such matters as their utterances as citizens, the exercise of their responsibilities to students and colleagues, and their conduct when resigning from an institution or when undertaking sponsored research. The *Statement on Professional Ethics* that follows sets forth those general standards that serve as a reminder of the variety of responsibilities assumed by all members of the profession.

In the enforcement of ethical standards, the academic profession differs from those of law and medicine, whose associations act to ensure the integrity of members engaged in private practice. In the academic profession the individual institution of higher learning provides this assurance and so should normally handle questions concerning propriety of conduct within its own framework by reference to a faculty group. The Association supports such local action and stands ready, through the general secretary and the Committee on Professional Ethics, to counsel with members of the academic community concerning questions of professional ethics and to inquire into complaints when local consideration is impossible or inappropriate. If the alleged offense is deemed sufficiently serious to raise the possibility of adverse action, the procedures should be in accordance with the 1940 *Statement of Principles on Academic Freedom and Tenure*, the 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings*, or the applicable provisions of the Association's *Recommended Institutional Regulations on Academic Freedom and Tenure*.

The Statement

1. Professors, guided by a deep conviction of the worth and dignity of the advancement of knowledge, recognize the special responsibilities placed upon them. Their primary responsibility to their subject is to seek and to state the truth as they see it. To this end professors devote their energies to developing and improving their scholarly competence. They accept the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. They practice intellectual honesty. Although professors may follow subsidiary interests, these interests must never seriously hamper or compromise their freedom of inquiry.
2. As teachers, professors encourage the free pursuit of learning in their students. They hold before them the best scholarly and ethical standards of their discipline. Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors. Professors make every reasonable effort to foster honest academic conduct and to ensure that their evaluations of students reflect each student's true merit. They respect the confidential nature of the relationship between professor and student. They avoid any exploitation, harassment, or discriminatory treatment of students. They acknowledge significant academic or scholarly assistance from them. They protect their academic freedom.
3. As colleagues, professors have obligations that derive from common membership in the community of scholars. Professors do not discriminate against or harass colleagues. They respect and defend the free inquiry of associates. In the exchange of criticism and ideas

professors show due respect for the opinions of others. Professors acknowledge academic debt and strive to be objective in their professional judgment of colleagues. Professors accept their share of faculty responsibilities for the governance of their institution.

4. As members of an academic institution, professors seek above all to be effective teachers and scholars. Although professors observe the stated regulations of the institution, provided the regulations do not contravene academic freedom, they maintain their right to criticize and seek revision. Professors give due regard to their paramount responsibilities within their institution in determining the amount and character of work done outside it. When considering the interruption or termination of their service, professors recognize the effect of their decision upon the program of the institution and give due notice of their intentions.
5. As members of their community, professors have the rights and obligations of other citizens. Professors measure the urgency of these obligations in the light of their responsibilities to their subject, to their students, to their profession, and to their institution. When they speak or act as private persons, they avoid creating the impression of speaking or acting for their college or university. As citizens engaged in a profession that depends upon freedom for its health and integrity, professors have a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.